Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CROW TRIBE OF INDIANS,

Petitioner,

v.

CAMPBELL FARMING CORPORATION; ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION, d/b/a SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY, AND KMH RANCH COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether summary reversal is appropriate where the court of appeals affirmed the dismissal of an action based on a ground which was not addressed or mentioned in the district court's opinion, was not presented as an issue to the court of appeals, and no opportunity was provided for the parties to brief or argue the issue on which the decision was based.

2. Whether the Crow Tribe has a right of action to enforce section 2 of the Crow Allotment Act of 1920, 41 Stat. 751, which protected Crow tribal members by prohibiting conveyances of land within the Crow Reservation to persons who own more than specified amounts of reservation land.

LIST OF PARTIES

The principal parties to this case appear in the caption. In addition, the 162 individuals and entities listed in footnote 1 who own, or claim to own, land within the Crow Indian Reservation, were allowed to intervene.[1]

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[1] A.G. Ballensky Co., a Montana corporation; Gary R. Ballensky; Agri-West Inc., a Montana corporation; Joe Bassett; Matthew Bassett; Becker Land & Livestock, Inc., a Montana corporation; Gary B. and Vicki K. Bishop; Blue Creek Farms, Inc.; P.L. Boyd; William L. and Patricia A. Breen; J. Loren and Janet R. Brooks; Harriet C. and Murry J. Brown; Peter Campot; Centaur Capitol Corp., a Montana corporation; CH Land & Cattle Co., a Montana corporation; William R. and Doris M. Crawford; Cross A Ranch, Inc., a Montana corporation; Marie Bainter Crum; William V. Daum; Sam E. Denny; Glenn Lee and Rhonda Elhard; Leo M. and Betty Elhard; LeRoy Enzminger; Henry L. and Donna M. Esp; Faddis Kennedy Cattle Co., a Montana corporation; Linda C. Fenter; First Continental Corporation, a Montana corporation; Flying V Cattle Company, a Wyoming corporation; John Elisha Fowler; Charles F. Fuller; Kathy Jo Genatone; Patrick K. and Florence M. Goggins; C. Allen Graham; Gary Joe and June I. Graham; Nelle Yvette Graham; Susan Graham; Greenwalt Farms, Inc., a Montana corporation; Hamilton Ranch, Inc., a Montana corporation; George J. and Jo Annette Hammond; Charles E. Helvey; Norma L. Henderson; H. Burton Hoffman; Eric Daniel Hope; Gary David and Nona Eileen Hope; Joe E. and Barbara Hope; Joseph Albert Hope; Shane Samuel Hope; G. Irwin Hults; Ralph M. Hults; Hale C. and Terry E. Jeffers; Torrey B. Johnson; Jones Bros. Livestock Co., a Montana corporation; Knowles Land Co., a Montana corporation; Joe V. Koebbe; Lawrence Koebbe; Robert L. and Jean Kukes; Dick R. Kukowski; Jack Kukowski; Ray Kukowski; Steve and Linda Kukowski; Lackman Farming Corp.; Charles Lee; Jay Lee; Helen Lee; Peter Manigault; Edythe Turley McCleary Trust; Bowman Merritt; Carter and Helene R. Miklovich; Pete and Kara Jean Miklovich; Paul Miller; Wade and

LIST OF PARTIES – Continued

The United States filed a brief and argued as amicus curiae before the Court of Appeals.

Joan Miller; William Lee Miller; Millers Owl Creek Ranch, Inc., a Montana corporation; Willard I. Moehr; Montaylor Corp., a Montana corporation; Casey Munter; Leonard F. and Inger Munter; Allene Murdock; Judith Ann Murdock; Lyle M. Neal; Nicholson Ranch; Padlock Ranch Company, a Wyoming corporation; Pearlie Lee & Co.; Joe and Pauline Peters; Harold E. Pilkington; Harvey Pitsch; Irvin Pitsch; Ronald G. and Patricia B. Pitsch; Ella Jane Porter; Darrell and Mary Rathkamp; Paul R. Roberts; Herta G. Schaak; LeeRoy Schoneman; Dan S. Scott; Scott Land & Livestock Co., a joint venture; Robert G. Shaw; Mary Slattery; Howard W. and Shirley R. Snively; Soap Creek Cattle Co., a Montana corporation; Spear O Ranch Company, a Montana corporation; Byron Stimpson; Stimpson Bros. Ranch Inc.; Roy C. and Nancy M. Streets; Ward and Judy Swanser; Robert E. Swift; William B. Swift; T.T. Ranch, Inc., a Montana corporation; Lila V. and Walter J. Taylor, Jr.; Max E. and Katherine L. Thorton; Margaret Miller Torske; Torske Cattle Co.; Torske Land & Livestock; Lynn N. Torske; Nils E. & Lois N. Torske; Lyle B. and Jocelyn J. Tyler; Wayne Uffelman; Uffelman Farms, Inc., a Montana corporation; William and Helen Uffelman; Vale Creek Ranch, a Montana corporation; Eugene Veenhuis; John E. Walborn; Walborn Cattle Co.; Ronald Wald; Dennis K. Warren; Harvey and Charlene Warren; Floyd Warren, Inc., a Montana corporation; David & Beverly Watson; Walter Willett; and Larry C. Wilson.

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Petitioner Crow Tribe of Indians respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 20, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 31 F.3d 768 (9th Cir. 1994) and is reproduced as Appendix

(App.) A at 1-10. The order denying the petition for rehearing filed by the Crow Tribe is reproduced as App. C (at 35). The opinion of the District Court is reported at 828 F. Supp. 1468 (D. Mont. 1992) and is reproduced as App. B (at 11-34).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 20, 1994. The Crow Tribe's petition for rehearing was denied on October 28, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the 1920 Crow Allotment Act, 41 Stat. 751, provides as follows:

> No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly

or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

The classification of the lands of such reservation for the purpose of allotment and the allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910, which classification with any heretofore made by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved.[2]

STATEMENT OF THE CASE

This action was filed by the Crow Tribe (Tribe) against several defendants who, the Tribe alleged, own (or claim to own) land within the Crow Reservation in violation of the acreage limits prescribed by section 2 of the 1920 Crow Allotment Act. Jurisdiction is premised on 28 U.S.C. §§ 1331 (federal question) and 1362 (suit by Indian tribe raising federal question).

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[2] Section 2 was amended by Act of June 8, 1940, 54 Stat. 252. The 1940 amendment added a proviso to the first paragraph of section 2 which authorized the Secretary of the Interior to approve sales or exchanges of reservation lands to Crow tribal members without regard to the acreage restrictions.

The Crow Allotment Act of 1920 provided generally for the allotment of land on the Crow Reservation in Montana to members of the Crow Tribe. 41 Stat. 751. In addition to allotting land to tribal members, the Act reserved certain land and resources on the Reservation in common for the benefit of the Tribe (sections 5, 6, 10), required individual Crow Indians to designate a 640-acre homestead, only portions of which could be sold (section 13) and appropriated funds for tribal business (section 7).

Section 2 limits the amount of land non-Crow Indians may acquire within the Crow Reservation to no more than 1,280 acres of agricultural land or 1,920 acres of grazing land. It provides that conveyances made in violation of those restrictions "shall be void" and that the purchasers of excess acreage "shall be guilty of a misdemeanor." In its complaint, the Tribe contended that the defendants' allegedly unlawful ownership of Crow Reservation lands acquired in violation of section 2 harmed the agricultural and grazing economy within the Crow Reservation, prevented the Tribe and its members from enjoying the use of lands within the Reservation and dispossessed the Tribe and its members from lands within the Reservation, thereby causing the Tribe to be deprived of the use of such lands. ER 11.[3]

According to a 1986 Audit Report of the Interior Department's Inspector General, which was attached to and incorporated in the Tribe's complaint, violations of section 2 began in the 1940s and continued to the time of

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[3] ER refers to the Excerpts of Record filed with the court of appeals.

the report. ER 15. From 1946 to 1955, the Bureau of Indian Affairs sold more than 110,000 acres of Reservation land through supervised sales without any attempt to comply with section 2's acreage limitations. Although the precise amount of land held by section 2 violators is unknown, "all indications are that the violations have been numerous and substantial." *Ibid.*[4]

The 1986 Audit Report also states that the Interior and Justice Departments have considered bringing an action to enforce section 2 but have not done so even though "no one ever questioned the merits of the case." ER 16. "The main reason for the delays between 1976 and 1981 was that, every time a new political appointee was selected to manage either of the respective departments, the case would be sent back to the other department to determine whether departmental policy regarding the case remained the same." *Ibid.* Interior's Inspector General recommended that the Interior and Justice Departments initiate a test case to enforce section 2, but no such action has been filed by the federal government.

The defendants moved to dismiss, contending, *inter alia*, that the Tribe lacked standing to bring an action under section 2. Defendant Campbell Farming Corporation also claimed that Montana's five-year statute of limitations barred the Tribe's action against it.

The District Court held that the Tribe lacked standing to bring an action under section 2 and that the Tribe's

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[4] The Tribe's complaint alleges that defendant Campbell owns more than 45,000 acres and that defendant Holding and the corporations he controls own about 140,000 acres. ER 6, 7.

complaint therefore must be dismissed for lack of jurisdiction with respect to all defendants. App. 27-34. It concluded that the Tribe had failed to satisfy the "injury in fact" requirement for constitutional standing, terming the Tribe's allegations mere "abstract contention[s] of harm," "generalized assertion[s] of policy considerations behind [section] 2," and "speculative inference[s] of the effects of landowners owning large amounts of land." In any event, the District Court ruled, the Tribe could show neither the necessary causal relationship between its alleged injuries and the defendants' purchase of lands in excess of section 2's limits, nor any substantial likelihood that its alleged injuries would be redressed by a decision in its favor.

The District Court also granted summary judgment to Campbell Farming Corporation based on Montana's statute of limitation. App. 19-27. Although the Court acknowledged that state statutes of limitations may be applied to federal claims only in limited circumstances, it concluded that the state statute applied by virtue of section 6 of the General Allotment Act, 25 U.S.C. § 349,[5] as construed in *Dillon v. Antler Land Co.*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975). Among other things, the Court rejected the Tribe's arguments that section 6 does not subject the Tribe, as opposed to individual tribal members, to state law, that the Tribe's claim is governed by the federal statute of limitation, 28 U.S.C. § 2415, as construed in *County of Oneida v. Oneida Indian*

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[5] Section 6 provides that "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."

Nation, 470 U.S. 226 (1985), and that the Supreme Court's subsequent decisions in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1975), and *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S. ___, 112 S. Ct. 683 (1992), significantly limit or undermine the holding of *Dillon* and severely circumscribe the application of state law to Indians pursuant to section 6.[6]

On appeal, the Ninth Circuit affirmed the dismissal but not on the grounds of lack of standing or the running of the state statute of limitations. Rather, the Court of Appeals held that the Tribe does not have a cause of action under section 2. This issue had not been presented by any party or by the United States as amicus curiae.[7]

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[6] Standing alone, the District Court's disposition of the statute of limitations defense presented solely by Campbell Farming Corporation would not have been appealable because it did not dispose of all of the Tribe's claims with respect to all parties or even all of the claims against Campbell. See App. 19 & 27 n.19.

[7] The "Issues Presented" in the Tribe's Brief to the Ninth Circuit were stated as follows:

> 1. Whether the Crow Tribe has standing to bring an action to enforce a federal law limiting the amount of land non-Crow Indians may acquire within the Crow Indian Reservation.
>
> 2. Whether the state statute of limitations applies to an action brought by the Crow Tribe to enforce a federal law limiting the amount of land non-Crow Indians may acquire within the Crow Indian Reservation.

The defendants' "Statement of Issues Presented for Review" was as follows:

> 1. Did the District Court properly dismiss the Tribe's complaint for lack of standing where the Tribe satisfies none of the Article III requirements for

Applying only the first two of the four factors identified in *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court of Appeals concluded that section 2 was enacted for the benefit of Crow tribal members, but not for the Tribe, and that Congress intended only individual Crow Indians to have a right of action. App. 6-7. The Court therefore found it unnecessary "to address the questions whether the Tribe lacks traditional standing or whether the state statute of limitations bars the Tribe's claim." App. 10.

The Tribe sought rehearing and requested that the Court of Appeals withdraw its opinion and judgment and either remand the case to the District Court for consideration of the question of whether the Tribe has a right of action to enforce section 2 or invite the parties to submit

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standing, where the Tribe admittedly has no ownership interest in the lands that are the subject of the Tribe's complaint, and where Section 2 of the Crow Allotment Act of 1920 was not enacted for the benefit of the Tribe?

2. Did the District Court properly grant summary judgment to CFC based on the court's determination that even if the Tribe has standing, its claims are nevertheless barred by the Montana statute of limitations made applicable by federal law to the lands here involved?

The "Issues Presented" by the United States as amicus curiae were stated as follows:

1. Whether the Crow Tribe has standing to bring an action under Section 2 of the Crow Allotment Act, 41 Stat. 751 (1920).

2. Whether the Montana statute of limitations applies to an action brought by the Crow Tribe under Section 2 of the Crow Allotment Act.

supplemental briefs addressing that issue. The petition for rehearing was denied without comment. App. 35.

REASONS FOR GRANTING THE WRIT

1. Summary Reversal Is Appropriate To Provide The Tribe A Full, Fair, And Meaningful Opportunity To Be Heard.

Whether the Tribe has a right of action to enforce section 2 was not addressed by the District Court and was not an issue presented for review to the Court of Appeals by any party or by the United States as amicus curiae. *See* n.7 *supra*.[8] Nor was it the subject of oral argument.

The Tribe does not challenge the jurisdiction or authority of appellate courts to affirm lower court judgments based on any ground supported by the record. *See* App. 4 n.1. It does, however, question the propriety, as well as the fairness, of deciding dispositive issues without providing the parties a full, fair and meaningful opportunity to be heard. It is one thing for a court to affirm on a ground not addressed by the lower court. It is quite another to do so unilaterally, without

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[8] Under the heading "The Tribe Cannot Establish Its Own Standing By Simply Alleging A Violation Of Section 2," the defendants devoted approximately 1½ pages of their 47 page appellate brief to a discussion of the factors for determining whether a private cause of action to enforce a statute exists. The Tribe responded with a comparable 1½ page argument in its 25 page *reply* brief. The issue was not mentioned in the Tribe's 50 page opening brief, the government's 24 page amicus brief, or the defendants' 20 page response to the government's amicus brief.

providing the parties a full, fair and meaningful opportunity to be heard. The latter course undermines our adversary system of justice as well as the rules of practice and procedure which are designed to insure procedural due process and informed decision-making by our Nation's courts.

All governmental entities, most especially the courts, must provide interested parties the opportunity to present their case effectively, with procedures designed to minimize the risks of erroneous decisions. *Landon v. Plasencia*, 459 U.S. 21, 36-37 & n.9 (1982). The opportunity to be heard must be provided at a meaningful time and in a meaningful manner. *Barry v. Barchi*, 443 U.S. 55, 66 (1979). Though there are situations when federal appellate courts are justified in resolving issues not passed on below,[9] "injustice [is] more likely to be caused than avoided by deciding the issue without [a litigant] having had an opportunity to be heard." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). Thus, for example, in *Landon v. Plasencia*, 459 U.S. at 36-37 & n.9, this Court declined to decide issues which had not been adequately discussed by the parties. *See also, Montana v. Hall*, 481 U.S. 400, 410 (1987) (Marshall, J. dissenting) (when courts contemplate a summary disposition on an issue that has not been briefed on the merits, the parties should be invited to file supplemental briefs to accommodate the reasonable expectations of litigants and the integrity of the judicial system and to

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[9] Clearly, this is not a case "where the proper resolution is beyond any doubt" or "injustice might otherwise result." Singleton v. Wulff, 428 U.S. at 121. See *infra* at 12-22.

achieve the fairness and accuracy that the Nation rightfully expects from its courts); *Board of Educ. of Rogers, Ark. v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J. dissenting) ("The threat to the quality of our work that is presented by the ever-increasing impersonalization and bureaucratization of the federal judicial system is far more serious than is generally recognized"); and *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 271-272 (1982) (Blackmun, J. dissenting) (deciding a case on the basis of issues not raised or briefed "demeans the Court and its work . . . [,] surely tends to lessen the quality of its legal product . . . [and] deprives respondents of their 'day in court' in a singularly inappropriate manner").

The petition for certiorari should be granted and this case summarily remanded to the Court of Appeals with instructions either to remand to the District Court for consideration of the question whether the Tribe may sue to enforce section 2 or to provide the parties an opportunity to file supplemental briefs addressing that issue. By so doing, this Court would send a clear message to the lower federal courts, especially the appellate courts (which are the courts of last resort in virtually all federal court cases), that they should not decide cases on the basis of issues which the litigants have not had a full, fair and meaningful opportunity to address.

2. The Decision Below Does Not Consider And Conflicts With Decisions Of This Court Regarding The Relationship Between An Indian Tribe And Its Members, The Meaning Of "Void" As Used In Federal Statutes, And The Right Of Indian Tribes To Be Treated Like The United States.

a. The Court of Appeals acknowledged that section 2 of the Crow Allotment Act "was enacted for the benefit of a group of individuals, each of whom is a member of the [Crow] Tribe . . . " App. 6. In this regard, it is significant that the intended beneficiaries of section 2 were not any Indians, but only those belonging to, and living within the territory of, the Crow Tribe. It also recognized that the purpose of section 2 was to protect all tribal members who own land within the Crow Reservation, not just those who sell to ineligible purchasers. App. 7-9. Nevertheless, it proceeded to make a sharp and rigid distinction between the Tribe and its members, as if they are entirely separate, without citing any law and overlooking the controlling decisions of this Court.

At first blush, it would appear that a statute enacted for the benefit of Crow tribal members also would benefit, and would be intended to benefit, the Crow Tribe. After all, a tribe is a "group" or "body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U.S. 261, 266 (1901); Felix S. Cohen, *Handbook of Federal Indian Law* 3, 12 (1982 ed.). It would defy ordinary language as well as common sense, for example, to argue that a statute designed to benefit the residents of a particular area, say earthquake victims in Los Angeles,

was *not* also intended to benefit the City or County of Los Angeles, or that a treaty or statute enacted for the benefit of a tribe was *not* also intended to benefit the members of the tribe. In the absence of any indication of an adversity of interest between a community and its residents or a tribe and its members,[10] one would naturally and ordinarily believe that a law enacted to benefit one also would be intended to benefit the other. It is therefore not at all surprising that Congress did not expressly consider the rights and interests of the Tribe under section 2 as separate and distinct from those of its members, especially since section 2 does not directly implicate the Tribe's governmental interests.

This Court has rejected efforts to draw a rigid distinction between a tribe and its members and applied the common sense view that a tribe and its members are inextricably intertwined. In *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977), the State of Washington sued 41 members of the Puyallup Tribe claiming that they were fishing in violation of state law. The Tribe filed an answer which, this Court noted, "used the term 'tribe' in

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[10] Cf. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (noting the "two distinct and competing purposes" of the Indian Civil Rights Act, strengthening the position of individual tribal members vis-a-vis the tribe and furthering Indian self-government); Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) (suit between a tribe and its members regarding title to minerals underlying allotted Indian lands); Barany v. Buller, 670 F.2d 726 (7th Cir. 1982) (interests of two classes were different and in conflict, such that membership in both classes precluded right of action available to only one of them).

two senses, first as a collective synonym for the individual defendant-members, and also as referring to a sovereign Indian nation." 433 U.S. at 168-169. The Tribe continued to participate in the lengthy litigation "in the dual capacity of a sovereign entity and as a representative of its members who were individual defendants," 433 U.S. at 169-170, and this Court held that the Tribe properly represented and stood in judgment for its members, 433 U.S. at 173.

Thus, in *Puyallup* the Supreme Court acknowledged that the terms "Indian tribes" and "tribal members" are often and properly used synonymously and interchangeably. A reference to the members of a tribe ordinarily and necessarily encompasses the tribe and vice-versa. The Court of Appeals ignored the teachings of this Court in drawing a sharp and rigid distinction between the Crow Tribe and its members, and in finding that Congress intended to benefit the tribal members but not the Tribe.

Moreover, under *Puyallup*, the Crow Tribe is appropriately representing the interests of its members who, the lower court held, were the especial and intended beneficiaries of section 2. Similarly, in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 468 n.7 (1976), this Court held that a tribe properly represented its members in a suit challenging the validity of state taxes imposed on and paid by its members.

This Court should grant review to consider the relationship between the Tribe and its members in the context of a statute which protects the interests of tribal members

against third parties in light of *Puyallup*, *Moe* and *Montoya*.

b. The primary basis for the lower court's conclusion that the Tribe does not have a cause of action to enforce section 2 was the provision invalidating conveyances of land to ineligible purchasers. App. 6-7. It reasoned that void conveyances necessarily result in title remaining in the would-be sellers and therefore individual Indians alone, not the Tribe, would benefit from enforcement of the statute.

Here too the Court of Appeals rushed to judgment without benefit of briefing and in the process overlooked this Court's controlling precedents. In so doing, that Court improperly prejudged the ultimate issue of the appropriate remedy (or remedies) at a very preliminary stage of the litigation.

The use of the word "void" in a statute does not always or necessarily mean that the transaction must be regarded as a nullity. Rather, "void" sometimes means "voidable." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386-389 (1970); *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 311 (1935) ("void" in the context presented "is the equivalent of voidable"). As stated in *Ewell v. Daggs*, 108 U.S. 143, 148-149 (1883):

> But these words ["void and of no effect"] are often used in statutes and legal documents . . . in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances.

In fashioning an appropriate remedy for transactions declared void by statute, courts must strive "to make effective the congressional purpose," while also "keeping in mind the role of equity as 'the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' " *Mills v. Electric Auto-Lite Co.*, 396 U.S. at 386, citations omitted.

Contrary to the lower court's apparent assumption, the remedy issue under section 2 is difficult and complex; it is not a simple matter determined automatically, insensitively, thoughtlessly and mechanically. There is a broad array of potential remedies which could be fashioned to redress violations of section 2, including an order directing the violators to divest themselves of their excess land holdings, with or without compensation. *See, e.g., Franklin v. Gwinnett County Public Schools*, ___ U.S. ___, 112 S.Ct. 1028 (1992) (" 'Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done' ").

The Tribe, as the representative of its members and as the governing body of the Crow Reservation, has an enormous stake in protecting individual Crow Indians as well as the character of the Crow Reservation. It is therefore the most appropriate and logical plaintiff. *See, e.g., Arizona v. California*, 460 U.S. 605, 615 (1983) (federal policy encourages the participation of tribes in litigation critical to their welfare). In any event, the teaching of this Court is that the use of the word "void" in a statute should not be construed in an inflexible manner at a

preliminary stage of litigation so as to determine conclusively the parties who may or may not have a right to sue.

Further, the Court of Appeals clearly erred in assuming that only tribal members who sell to ineligible purchasers would stand to benefit from suits to enforce section 2 by retaining title to the land they illegally conveyed. Under the positions of both the Tribe and the defendants regarding the purpose of section 2, the utilization of Reservation land by farmers and ranchers who do not own more than 1,280 acres of agricultural land or 1,920 acres of grazing land would benefit all tribal members and especially those who remain on the Reservation and earn their living from their land. These tribal members would benefit by not being subjected to pressures to sell their land to large landowners or speculators and by being able to maintain their own small farming and ranching operations rather than being transformed into "mere sharecroppers." *See* App. 7-9.

Thus, even if the Court of Appeals turns out to be correct in assuming that the sole remedy for section 2 violations is returning the illegally conveyed land to the persons who sold it to ineligible buyers, it would not follow that Congress intended that only those sellers should have a right of action. Indeed, by not analyzing the third *Cort v. Ash* factor,[11] whether a right of action in

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[11] See App. 4-5. In conflict with its decision below, in Harper v. Federal Land Bank of Spokane, 878 F.2d 1172, 1174 (9th Cir. 1989), and In re Washington Public Power Supply System Securities Litigation, 823 F.2d 1349, 1354 (9th Cir. 1987) (en banc), the Ninth Circuit held that the second and third factors

the Tribe would further the purpose of section 2, the lower court failed to recognize that limiting the remedy to Crow tribal members who sell their land to ineligible purchasers would undermine section 2. The true beneficiaries of the acreage limitation, those tribal members who remain on the Reservation and live and work on their small farms and ranches, would be left without a remedy, at the mercy of the non-Indians who acquire large landholdings from tribal members who sell their land, leave the Reservation and do not file suit to invalidate the conveyances.[12]

The Court of Appeals correctly recognized that Congress clearly intended to provide a civil remedy to redress violations of section 2. App. 6; *see also, Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 18 (1979) (statute declaring certain contracts void necessarily meant that the issue of voidness would be litigated). By taking the inquiry an additional step and concluding that

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are the most important in determining whether a cause of action should be implied. The fourth Cort v. Ash factor also supports a federal right of action in the Tribe because the Tribe's suit arises under federal law and the field of federal Indian law is not traditionally governed by state law.

[12] To tribal members who sell their land, it makes no difference whether the purchaser is eligible or ineligible under section 2; their economic interest presumably is in obtaining the highest price. A suit to invalidate the conveyance ultimately could result in sellers receiving a lower price from eligible purchasers than they were able to obtain from large landowners with excess acreage. They also might be required to return a part or all of the consideration they already received and perhaps spent. These sellers would have little or no interest in bringing suit to invalidate conveyances made void by section 2.

only Crow tribal members, not the Tribe itself, could sue, the lower court ignored and violated the teachings of this Court concerning the construction of the word "void" in federal statutes, improperly prejudged the ultimate issue concerning the appropriate remedy and wound up by entrusting the enforcement of the statute to those who may have little to gain and much to lose by bringing suit. In all of these respects, this case presents a classic example of why courts should not decide issues without first providing litigants a full, fair and meaningful opportunity to be heard.

Once the deck is cleared of the misconceptions discussed above, there should be no doubt that the Tribe has a cause of action to enforce section 2. All four *Cort v. Ash* factors are satisfied. The Crow Tribe and its members are the especial beneficiaries of the statute. Congress intended to create a private cause of action to enforce the acreage limitation. The Tribe's suit furthers the legislative purpose and is appropriate for resolution by a federal court. The petition for certiorari should be granted to consider the cause of action issue based on proper understandings of the relationship between an Indian tribe and its members and of the broad range of remedies potentially available to redress violations of section 2.

c. The Court of Appeals carefully noted that it was not deciding the potential right of the United States to sue to invalidate illegal conveyances under section 2. App. 7 n.2. Under 28 U.S.C. § 1362, however, suits brought by Indian tribes are treated in certain respects as if the United States were the plaintiff. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. at 472-475. Therefore, under *Moe*, before dismissing the action the lower court

was required to determine whether the United States could sue to enforce section 2, and, if so, whether the Tribe stands in the shoes of the United States pursuant to section 1362. By not addressing this potentially dispositive issue, the decision below also conflicts with *Moe*.

3. The Court Of Appeals' Analysis Of The Cause Of Action Issue Conflicts With The Decisions Of Other Circuits.

As previously noted, the Court of Appeals acknowledged that section 2 was enacted for the especial benefit of Crow Tribal members and that tribal members have a right to sue to invalidate conveyances to ineligible purchasers. The result of that analysis should have been that the Tribe, as the representative of its members and the governing body of the Crow Reservation, also has a cause of action under section 2. Before reaching that seemingly inescapable conclusion, however, the Court of Appeals took a detour by conducting a search for specific evidence that Congress intended to vest a cause of action in a particular plaintiff, i.e., the Tribe. To the best of the Tribe's knowledge, this aspect of the Court of Appeals decision is unique and conflicts with the analytical approach to the cause of action issue in the decisions of all other federal appellate courts.

First of all, the only authority cited by the Court of Appeals, *California v. Sierra Club*, 451 U.S. 287, 294 (1981), App. 9, is inapposite. In that case, this Court held that the statute at issue was intended to benefit the public at large

as opposed to any particular people. No especial beneficiaries of the statute were identified, so there was no occasion to constrict the class in manner in any way comparable to the circuit court's hairsplitting and artificial distinction between Crow tribal members and the Crow Tribe.

No other court has even considered fashioning so fine a distinction between two such closely related parties as the Crow Tribe and its members in determining whether a plaintiff has a cause of action. To the contrary, the lower federal courts have recognized that Congress rarely identifies the specific beneficiaries of its laws, *American Telephone & Telegraph Co. v. M/V Cape Fear*, 967 F.2d 864, 870 (3d Cir. 1992), and that, "properly conducted," the kind of inquiry undertaken in *California v. Sierra Club* "weeds out statutes which protect a general public interest and only incidentally create advantages for particular people," *Sterling Suffolk Racecourse Ltd. Partnership v. Barrellville Racing Ass'n., Inc.*, 989 F.2d 1266, 1269 (1st Cir. 1993). Since the Court of Appeals correctly found that section 2 was intended to protect particular people, i.e., Crow tribal members, the analysis of the first *Cort v. Ash* factor should have ended with the observation that the Crow Tribe is suing as the representative of its members followed by a citation to *Puyallup Tribe v. Washington Game Department.*

The Court of Appeals clearly erred in conducting a search for specific evidence that Congress intended to benefit the Tribe *qua* Tribe as opposed to the members of the Tribe. There is simply no authority or justification for that kind of investigation which would impose burdens that Congress could not possibly meet. Rather, as illustrated by *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d

701, 705 (1st Cir. 1977), courts should analyze the purpose, logic and structure of a statutory provision to determine the relationship between the plaintiff and the benefits bestowed by the statute and whether a suit by the plaintiff would vindicate the policies promoted by law. [13] In the case at bar, there is no doubt that the Tribe's action would carry out Congress's policy of protecting tribal members who own land within the Crow Reservation from undue pressure and exploitation from large landowners.

The Tribe's petition for certiorari should be granted to correct lower court's unique departure from established precedent in its analysis of the first *Cort v. Ash* factor and to avoid unnecessary confusion in this important and frequently reoccurring area of law.

CONCLUSION

The Tribe was denied a full, fair, and meaningful opportunity to be heard on the issue decided by the Court of Appeals. This Court should grant the Tribe's petition and either summarily reverse to provide that opportunity or set the case for full briefing and argument to consider the issues and conflicts raised by the lower

[13] In Comtronics, the Court of Appeals held that suppliers of certain equipment have a right of action to enforce a law intended to protect consumers of telephone services because the consumers and suppliers have an identity of interest and the suit by the suppliers would vindicate the consumers' interests. Identical considerations apply to the relationship between the Crow Tribe and its members in the context of Section 2.

court's unfortunate and unjust rush to judgment without benefit of the parties' views on the dispositive issue.

Respectfully submitted,

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JANUARY, 1995

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS,
Plaintiff-Appellant,

v. No. 92-36612

CAMPBELL FARMING CORPORATION;
D.C. No.
ROBERT EARL HOLDING; SINCLAIR
CV-91-00052-BLD-J
OIL CORPORATION, D/B/A SUNLIGHT
RANCH COMPANY; SUN VALLEYOPINION
COMPANY; AND KMH RANCH
COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
January 5, 1994 – Seattle, Washington

Filed July 20, 1994

Before: Eugene A. Wright, William C. Canby, Jr., and
Thomas G. Nelson, Circuit Judges.

OPINION

CANBY, CIRCUIT JUDGE:

The Crow Tribe of Indians brought an action against Campbell Farming Corporation, Robert Earl Holding and several companies controlled by Holding for violating section 2 of the Crow Allotment Act of 1920. The district court granted the defendants' motion to dismiss on the

grounds that the Tribe lacked standing to enforce the statute and that the Tribe's claims were barred by the Montana statute of limitations. Finding that the Tribe has no right of action under the provision in question, we affirm.

BACKGROUND

The Crow Indian Reservation encompasses roughly 2.3 million acres of land in southeastern Montana. In the Crow Allotment Act, 41 Stat. 751 (1920), Congress provided for the allotment of lands of the Tribe to individual members. Section 2 of the Act generally forbids the Secretary of the Interior from approving any direct or indirect conveyance of land from a Crow Indian to any person or company that owns 640 acres of agricultural or 1,280 acres of grazing land within the present boundaries of the Reservation. It also forbids approval of any conveyance to one who already owns land if, after the conveyance the person or company would own more than 1280 acres of agricultural or 1920 acres of grazing land. In addition to the directive to the Secretary, section 2 provides that any conveyance exceeding the acreage limitations is void. Anyone obtaining land in violation of the statute is subject to criminal penalties.

Campbell Farming Corporation allegedly owns more than 45,000 acres of land situated on the Reservation. Robert Earl Holding and companies under his control likewise allegedly own 140,000 acres of Reservation land. Asserting that these property interests clearly violate the acreage limitations set out in section 2 of the Act, the Tribe brought an action for a declaratory judgment that the

landowners' titles to these lands was void. The Tribe also sought to enjoin a proposed sale of land from Campbell Farming Corporation to Robert Holding.

In its prayer for relief, the Tribe requested that the defendants be divested of all lands in excess of the acreage limitations; that the Tribe be awarded damages for the illegal use, occupancy, and enjoyment of the land; and that the court award the Tribe trespass damages and attorney's fees.

Reasoning that the Tribe lacked standing to bring the action and, in any case, that the action was barred by the Montana statute of limitations, the district court granted the defendants' motion to dismiss. The Tribe appealed.

DISCUSSION

I. Introduction

The issue in this case is whether the Crow Tribe is a party entitled to maintain an action to enforce section 2 of the Crow Allotment Act. The district court characterized this question as one of standing. Applying traditional constitutional standing analysis, see, e.g., Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992), the district court ruled that the Tribe failed to plead sufficiently each element of standing.

The issue indeed bears some of the hallmarks of a standing problem. Resolution turns largely on the identity of the party bringing the suit rather than the merits of the claim. And it is a threshold issue of law that may be resolved early in the litigation on the pleadings. Although we agree with the district court that "the Tribe

has failed to establish its status as a party entitled to have the court decide the dispute raised in the complaint," we resolve the dispute not under traditional standing analysis, but by examining whether section 2 vests the Tribe with a right of action.[1] We conclude that it does not.

II. Analysis

We review this purely legal issue de novo. See Nevada v. Burford, 918 F.2d 854, 856 (9th Cir. 1990) (standing), cert. denied, 500 U.S. 932 (1991). In Cort v. Ash, 422 U.S. 66, 78 (1975), the Supreme Court laid down four factors to inform our determination of whether a statute creates a private right of action. First, we must consider whether the plaintiff is a member of "the class for whose especial benefit the statute was enacted – that is, does the statute create a federal right in favor of the plaintiff?" Id. (citations and quotations omitted). Second, and most important, we must examine whether Congress intended to create or deny a right of action. Id. If these inquiries do not resolve the issue, we must consider, third, whether a right of action in the plaintiff furthers the purpose of the legislative scheme at issue. Id. Finally, we must inquire whether inferring a federal cause of action would be inappropriate, because the area of law is one traditionally governed by state law. The focal point for our inquiry is the second factor, legislative intent. Harper v. Federal Land Bank of Spokane, 878 F.2d 1172, 1174 (9th Cir. 1989),

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[1] We may affirm the judgment of the district court on any ground supported by the record. See Suydam v. Reed Stenhouse of Washington, Inc., 820 F.2d 1506, 1508 (9th Cir. 1987).

cert. denied, 493 U.S. 1057 (1990). The first two factors are sufficient to inform our judgment in this case.

A. Especial Benefit of the Plaintiff

In considering whether the Tribe is a member of the class of people whom the law was intended to benefit, we first examine the language of the relevant provision, section 2 of the Crow Allotment Act:

> Sec. 2. No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such a conveyance, would become the owner of more than one thousand two hundred and eighty acres of agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

41 Stat. 751, 752 (1920).

Although its absence is not conclusive, we observe that the Tribe is not one of the actors mentioned in section 2. The provision mentions "any Crow Indian," the Secretary, and any person, company or corporation. The first term unambiguously refers to Indians in their individual capacities. Conspicuously absent is any reference to the Tribe or even a vague reference to "Indians" that might create room for argument. The use of such specific terms in the statute suggests that the statute was enacted for the benefit of a group of individuals, each of whom is a member of the Tribe, and not for the benefit of "the Tribe."

A statutory remedy is also an indicator of whom Congress sought to benefit when it drafted a statute. The remedial structure of the provision is clear. Section 2 unambiguously contains three mechanisms for insuring that the acreage limitations are not exceeded. First, a mandate: it forbids the Secretary from approving conveyances that exceed the acreage limitations. Second, a penalty: it imposes misdemeanor criminal sanctions on those who purchase land in excess of the acreage limitation. Finally, a civil remedy: any conveyance of title in violation of section 2 is void.

The specificity and comprehensiveness of this remedial structure is a likely indication that the list is exhaustive. See In Re Mexico City Aircrash of October 31, 1979, 708 F.2d 400, 407 (9th Cir. 1983) (express statutory administrative remedies exclude implied cause of action under Federal Aviation Act). Undoubtedly, Congress did not expect the secretarial mandate or the prosecution functions to be exercised by the Tribe. The civil remedy, likewise, provides no remedy to the Tribe. The Tribe was not a party to

any of the forbidden transactions, and was not an owner of the transferred land. When a conveyance of title to property is adjudicated void, ownership of the property simply remains in the would-be transferor. In this case, for example, the title to land obtained in violation of section 2 would have remained in the original allottees. In other words, individual Indians alone, rather than the Tribe, would benefit from enforcement of the statute.[2] That the sole civil remedy Congress provided in section 2 fails directly to benefit the Tribe is a clear indication that Congress did not intend to confer a right of action on the Tribe.

B. Legislative History

Although the text and the remedial structure of section 2 provide significant insight into whether Congress intended to create a cause of action in favor of the Tribe, the legislative history of the provision's purpose is inconclusive. The history is consistent, however, with the principle that Congress intended only individual Indians to have a right of action.

The Tribe recognizes that the Act was drafted at a time when Congress anticipated the assimilation of Indians into mainstream American society. The Tribe's theory is that Congress purposefully allowed non-Indians to own small parcels of land on the Reservation because they

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[2] Our discussion is limited to the remedies of allottees specified by the Act, in comparison with the absence of remedies for the Tribe. We express no opinion on the validity of any claims to the disputed property that may be asserted by others.

would serve as positive role models in the Indians' transition to farmers and ranchers. According to the Tribe, the purpose of the acreage limitation in section 2 was the creation of a community of small farmers and ranchers, both Indians and non-Indians, on the Reservation.

Concentrated ownership of vast quantities of land by large interests, on the other hand, was counter to the purpose of transforming the Indians into farmers and ranchers. See, e.g., H.R. Rep. No. 1043, 66th Cong., 2d Sess. at 3-4 (1920) ("it is not thought to be good public policy or for the best interests of the Indians to permit any one firm, person, or corporation to acquire any great acreage of the land"). Large landowners, it apparently was feared, might turn the Indians off the land or transform them into mere sharecroppers. In the view of the Tribe, then, section 2 was intended to insure that the Reservation was characterized by small farmers and ranchers and to prevent the tendency toward ownership of large tracts.

The defendants ascribe a much more limited purpose to section 2. Because many of the Indians' lands were subject to long term leases that decreased the value of the land, and because many Indians could easily be separated from their lands by land speculators who possessed hard cash, the defendants argue, Congress merely enacted section 2 to prevent the Indians from selling their land to speculators. The acreage limitation was especially effective against speculators because speculators frequently dealt in large quantities of land.

Although both readings of the legislative history are plausible (and perhaps both are correct), we need not

decide between them because the Tribe's assessment of the legislative purpose does not support a finding that Congress intended to confer a cause of action on the Tribe. The Tribe's description of the legislative history is more consistent with the view that Congress expected individual members of the Tribe to enforce the provision. Even under the Tribe's interpretation, the Act was drafted to make individual Indians more independent and to encourage them to become more reliant on their own individual parcels of land. Under these circumstances, it is reasonable to assume that Congress expected individual Indians to bring their claims on their own behalf, rather than to expect the Tribe to protect their rights.

The Tribe urges that it has an interest in the character of its Reservation wholly apart from the interests of the individual Indians who were allottees or their successors. That may well be true, but nothing in the text or history of the Act supports the view that Congress conferred on the Tribe a right of action to protect that interest. "The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." California v. Sierra Club, 451 U.S. 287, 294 (1981). We decline to insert the Tribe into the highly explicit provisions of the Act when Congress so clearly seems to have meant not to put it there.

CONCLUSION

Because the language and remedial structure of section 2 of the Act indicate that Congress did not intend to vest the Tribe with a cause of action and because the Tribe has failed to cite any legislative history that militates toward

an opposite conclusion, we conclude that the Tribe cannot maintain this action. This conclusion makes it unnecessary for us to address the questions whether the Tribe lacks traditional standing or whether the state statute of limitations bars the Tribe's claim.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiffs, vs. CAMPBELL FARMING CORPORATION; ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION, d/b/a SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY; and KMH RANCH COMPANY, Defendants, and A.G. BALLENSKY CO., et al., Defendant Intervenors.	Cause No. CV 91-52-BLG-JDS MEMORANDUM AND ORDER * * * (Filed Jul. 15, 1992)

The Crow Tribe of Indians (hereafter "Tribe") filed this lawsuit, seeking a declaratory judgment that the defendants Campbell Farming Corporation (hereafter "CFC"),[1] Robert Earl Holding, Sinclair Oil Corporation, d/b/a Sunlight Ranch Company, Sun Valley Company and KMH Ranch Company, as well as 162 farmer/rancher

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[1] The Complaint lists "Campbell Farming, Inc." but CFC's correct legal name is Campbell Farming Corporation.

Intervenors (hereafter all parties are referred to collectively as "defendants"), are in violation of § 2 of the Crow Allotment Act of 1920, 41 Stat. 751. The Tribe seeks an order enjoining the defendants "from continuing to violate Section 2" and damages that will compensate the Tribe for defendants' "illegal use, occupancy and enjoyment of land within the Crow Reservation," as well as damages for "trespass." In a nutshell, the Tribe asserts that § 2 requires this Court to declare void the defendants' title to land in excess of that allowed by § 2, and convey it to the Crow Tribe, a stranger to that title, without consideration for how long the defendants have held title and when and by whom the land was originally conveyed, nor for the improvements thereon (i.e., homes, buildings, fencing, etc.). Moreover, rather than compensating the present title-holders, the Tribe, on the basis of its alleged entitlement under § 2, seeks compensation from the defendants as they leave the property they assumed for years they legally owned. All this the Tribe seeks in the name of "equity." No completely accurate figures have been offered but it is no exaggeration to say the present lawsuit affects not only the named defendants, but generations of numerous families, hundreds-of-thousands of acres, and millions of dollars.[2]

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[2] A 1977 study by the Native American Rights Fund identified 56 persons on the Crow Indian Reservation who, at that time, owned more than the acreage specified in § 2. Collectively, those 56 persons owned more than 285,000 acres of land on the Reservation. *See* Exhibit 1 to Plaintiff's Complaint; Audit Report prepared by Office of Inspector General, Department of Interior. All non-Crow Indian land holdings on the Reservation in excess of the acreage specified in § 2 are potentially at risk if the Tribe prevails in this action. If the Tribe prevails, non-Crow landowners with small portions of land will be affected as well as

With the intensity so characteristic of all the briefing on the pending motion (briefing which exceeds 450 pages), defendant CFC contends, "Section 2 is an anachronistic and outdated law, which has never been effectively enforced during any of the seventy-one years since its enactment." (Brief of Defendant Campbell Farming Corporation In Support of Motion to Dismiss, p.4). While expressing that predisposition toward § 2, the defendants have moved to dismiss the Complaint, or in the alternative, for summary judgment, on numerous grounds.

Whether § 2 is, in fact, "an anachronistic and outdated law" is not for this Court to decide. That argument must be made to Congress. The motion to dismiss, however, is in the appropriate forum and, upon careful consideration, I am prepared to rule.

BACKGROUND AND FACTS

The General Allotment Act of 1887, commonly referred to as the Dawes Act,[3] culminated years of debate on allotment proposals and provided for mandatory allotment of certain tribal lands to individual Indians.[4] The original Dawes Act allotted acreage to each head of a household. An 1891 amended version of the Dawes Act provided allotments of 80 acres of agricultural land, or

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the owners of larger portions. It would be possible for someone owning as few as 641 acres to be held in violation of § 2.

[3] 24 Stat. 388, codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381.

[4] *See generally* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (F. Prucha ed.) (Norman: University of Oklahoma Press, 1973), pp. 3-7.

160 acres of grazing land, to each Indian. Act of Feb. 28, 1891, ch. 383, §§ 1-2, 26 Stat. 794 (codified as amended at 25 U.S.C. § 331).

Section 5 of the Dawes Act provided that title to allotments be held in trust by the United States for twenty-five years, or longer if the President so desired. During the trust period, encumbrances and conveyances were void. Generally, the laws of descent and partition in the state or territory where the lands were located applied following the termination of the trust period when patents were executed and delivered.[5]

Following the passage of the Dawes Act, a process of piecemeal amendment began. The Appropriations Act of June 21, 1906, gave the President discretion to extend the trust period of any allottee for as long as deemed necessary. Ch. 3504, § 1, 34 Stat. 325, 326 (codified at 25 U.S.C. § 391). The Burke Act of 1906 gave authority to the Secretary of the Interior alone to issue a patent in fee before the expiration of the trust period "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs." Ch. 2348, § 6, 34 Stat. 182, 183 (codified at 25 U.S.C. § 349). In 1934 the Indian Reorganization Act indefinitely extended the trust period of all allotments subject to it that were still in trust. 25 U.S.C. § 462. The Act also provided that no further lands were to be allotted. 25 U.S.C. § 461.

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[5] *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.), Ch. 2, Sec. C, pp. 127-143 for a good general discussion of allotments and assimilation.

The policy of the Dawes Act was the eventual assimilation of Indian tribes into the mainstream of American culture.[6] From time to time Congress passed special Allotment Acts directed at certain tribes pursuant to that policy of assimilation.[7]

On June 4, 1920, Congress enacted a statute, pursuant to the expressed policy of assimilation, commonly known as the Crow Allotment Act of 1920 (41 Stat. 751) (hereafter "1920 Act"). § 2 of the 1920 Act, as subsequently amended by the Act of June 8, 1940, 54 Stat. 252, provides in pertinent part:

> No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty of agricultural or one

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[6] *See* COMM'R IND. AFF. ANN. REP., H.R. EXEC. DOC. NO. 1, 51st Cong., 1st Sess. 3-4 (1889) ("tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted"); *see also* D.OTIS, supra note 6 at 8-9; F.COHEN, supra note 7 at 127-143; H.REP. 1576, 46th Cong., Sess. 2, 6; 11 Cong. Rec. 906 (Jan. 25, 1881); 15 Cong. Rec. 190-91; 8 Interior Dec. 647, 650 (1889); Instructions, 48 Interior Dec. 41, 43, 45 (1921).

[7] This policy continued in effect until passage of the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act. 25 U.S.C. § 461 et seq. This Act was an encouragement to tribal self-government.

> thousand nine hundred and twenty acres of grazing land within said Reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said Reservation as the same now exists, whether held by trust patent or patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.
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> . . .
>
> The classification of the lands of such Reservation for the purpose of allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 859), which classification with any heretofore made by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved.

41 Stat. 751

Allotments made pursuant to the 1920 Act were, under the terms of § 1, to "vest title in the allottee" subject only to existing tribal leases, which were not to be renewed or extended. Individual allotments were to be evidenced by patents in fee to "competent" Indians. Trust patents were to issue to minors and "incompetent" Indians. 41 Stat. 751, § 1.

The Legislative History of § 2 of the 1920 Act indicates a policy of preventing the exploitation of individual

Crow allottees.[8] Subsequent to the enactment of the 1920 Act, attention to § 2 fluctuated. At times, the government required an affidavit of compliance with § 2 from each buyer in a supervised sale. At other times, compliance was not required or enforced. In any event, the record before the court indicates that neither the Crow Tribe nor the United States, in its capacity as trustee, has enforced

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[8] *See e.g.*, H.R. CONF. REP. No. 1043, 66th Cong., 2d Sess. 3-4, *reported in* 59 *Cong. Rec.* 7845 (1920); *Indian Tribes of Montana: Hearings Before a Subcomm. of the House Comm. on Indian Affairs*, 66th Cong., 1st Sess. 18, 25 (1919); *Allotments to Crow Indians: Hearing Before the Senate Comm. on Indian Affairs on S. 2890*, 66th Cong., 1st Sess. 23 (1919); and S. REP. No. 219, 66th Cong., 1st Sess. 6 (1919). While there is a significant legislative history on § 2, it is potentially confusing when considered in light of the larger policy of assimilation behind the Dawes Act. There is no indication in the legislative history that § 2 was intended to contravene the policy of the eventual assimilation of the Indian population. It is reasonable therefore to read the legislative history of § 2 to prevent the exploitation of individual Crow allottees by opportunistic speculators and absentee purchasers of land that should be used by the individual Crow Indian to aid in his or her assimilation into the mainstream of American culture. An alternative reading of § 2 as intended to protect the integrity of the Crow Indian Reservation is unreasonable in light of the continuing policy behind the Dawes Act at the time Congress enacted the 1920 Act. § 2 may not reasonably be read in light of the Indian Reorganization Act of 1934, since such Act was still 14 years away when Congress enacted § 2. The 1920 Act, and specifically § 2, must be read and understood in its historical context. Supporting this reading of the § 2 legislative history is the fact that even Crow Indians were included in the acreage limitations until 1940. This lends credence to the reading that the purpose of § 2 was to prevent exploitation of the individual Crow allottees rather than to protect the integrity of tribal boundaries.

§ 2 during the seventy-one years of its existence prior to this action. *See* Complaint, para. 10.

On March 4, 1991, the Tribe filed its Complaint in this matter. The Complaint contains allegations that each of the defendants, with the exception of Robert Earl Holding,[9] own lands within the boundaries of the Crow Reservation which exceed 1280 acres of agricultural or 1920 acres of grazing land. *See* Complaint, para. 14-16. In its prayer for relief, the Tribe seeks an order requiring the defendants to divest themselves of the lands allegedly held in violation of § 2.[10]

DISCUSSION

The defendants and intervenors in this action have joined in a motion to dismiss, alleging numerous grounds. Some of the grounds briefed and argued more appropriately go to the merits of the action and therefore will not be considered at this stage of the proceedings. Additionally, CFC seeks summary judgment against the Tribe on statute of limitations grounds. Having fully considered the arguments advanced in open court and in

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[9] The Tribe's Complaint alleges that Mr. Holding owns only 301 acres of grazing lands within the Crow Reservation but that he exercises control over all the corporations named in the Complaint except CFC. *See* Complaint, para. 6, 12, 16, and 23.

[10] In an attempt to soften the harshness of this requested relief, counsel for the Tribe in oral argument on the motion to dismiss, asserted there were other forms of relief and that this was simply the "preferred" remedy. For the purpose of the motion presently before the court, however, the requested relief is irrelevant except to disclose the Tribe's novel idea of "equity."

over 450 pages of briefs, I find two threshold matters dispositive of the case.

CFC's Motion for Summary Judgment

A motion to dismiss by CFC under Rule 12(b)(6) is directed at the complaint in this matter on the ground that Montana's five-year statute of limitations applies to all challenges to ownership of lands acquired in alleged violation of § 2, whether acquired from Crow Indians who held fee patents, or through sales supervised by the government. Pursuant to Fed.R.Civ.P. 12(b) the court considers matters outside the pleadings and treats the motion to dismiss on this ground as a motion for summary judgment.

Statutes of Limitation

In support of its motion for summary judgment on this ground, defendant CFC submitted the uncontroverted affidavit of Ronald A. Pisk, establishing that (1) CFC has not purchased any land on the Crow Reservation from a Crow Indian within five years prior to the filing of the complaint herein, and (2) CFC did purchase one piece of land (160 acres) from a non-Indian within five years prior to the filing of the instant complaint. In response, the Tribe asserts that 28 U.S.C. § 2415 controls and provides the Tribe with an unlimited period of time within which to sue for violations of § 2.

Upon careful review of the arguments advanced, I find the Tribe's assertion unconvincing. It is well established that federal claims are subject to state statutes of

limitation unless there is a federal statute of limitations or a conflict with federal policy. *See*, e.g., *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 507 (1986) (citations omitted). Contrary to assertions by the Tribe, no federal statute of limitation exists for the present action, nor will the application of a state's statute conflict with federal policy.

In the absence of controlling federal law or policy, 25 U.S.C. § 349 requires the application of the state statute of limitations in the present case, under § 2.[11] *See Dillon v. Antler Land Company*, 341 F.Supp. 734 (Mont. 1972); *aff'd Dillon v. Antler Land Company*, 507 F.2d 940 (9th Cir.1974); *cert. denied* 421 U.S. 992 (1975). Following a recent United States Supreme Court decision, the Tribe argues for a re-interpretation of the *Dillon* analysis and holdings. The Tribe seeks to diminish the effect of *Dillon* on this case in two ways. First, the Tribe attempts to distinguish the present matter factually. It argues that § 349, if applicable at all, is correctly applied to an individual tribal member but not to the Tribe since, allegedly, the federal policy is to protect the Tribe's interest under § 2. Second, the Tribe attempts to weaken the precedential effect of *Dillon* by

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[11] Mont. Code Ann. § 70-19-401 states,

> No action for the recovery of real property or for the possession therefore can be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question within five years before the commencement of the action.

The uncontroverted affidavit of Mr. Pisk clearly shows that CFC has purchased no land (with the exception of 160 acres) within the five-year period required by Mont. Code Ann. § 70-19-401.

asserting that the recent Supreme Court decision of *County of Yakima, et al. v. Confederated Tribes and Bands of the Yakima Indian Nation*, 60 LW 4068, (January 14, 1992), casts doubt on the continued vitality of *Dillon's* holding.

With respect to the Tribe's first attempt to diminish the importance of *Dillon*, it draws an invalid distinction. State law controls in all cases when allotted lands have been conveyed to individual Indians by patent in fee because Congress has explicitly determined that it does. As the district court in *Dillon* noted, the issuance of the fee patent had a broader effect than merely to free the individual Indian to sell his or her land – "it freed the United States from its trustee duties and *altered the relationship of the land* and plaintiff (individual Indian) to the State of Montana." *Dillon* at 341 F.Supp. 734, 741 (citations omitted) (emphasis added). The relationship of the land to the State of Montana is altered by the issuance of a patent as well as the relationship of the individual Indian to the state. Accordingly, the Tribe's contention that § 349 applies state law only to the individual allottee is too narrow a reading and therefore without merit.

The Tribe's assertion that the recent *Yakima* decision questions the validity of the holding in *Dillon* is without merit as well. Contrary to the Tribe's contentions, the *Yakima* case does not bring into question the *Dillon* courts' holdings. Rather, it strengthens them. The question posed by the consolidated *Yakima* cases was whether the County of Yakima could impose an ad valorem tax on so-called "fee-patented" land located within the Yakima Indian Reservation, and an excise tax on sales of such land.

The Tribe in the instant case argues that the Supreme Court upheld Yakima County's authority to impose ad valorem taxes on Indian owned fee land on the basis of § 5 of the Indian General Allotment Act, rather than § 6.[12] The Tribe also seeks to limit the application of § 349 through the Supreme Court's reference to the first sentence of § 349 limiting the statute's applicability to "allottees" as opposed to their heirs, grantees or subsequent owners. The Tribe argues as well that the reasoning of the Supreme Court in *Yakima* inescapably leads to the conclusion that neither § 347 nor 349 should be extended beyond their plain and literal meaning to encompass actions brought by unterminated Indian tribes.

I do not agree with the Tribe's evaluation of *Yakima*. The Court reasoned that a fee patent would not subject its Indian owner to *plenary* state jurisdiction but fee ownership would free the *land* of "all restrictions as to sale, incumbrance or taxation." *Yakima* at 60 LW 4071 (quoting 25 U.S.C. § 349).[13] In the opinion, the Court drew a distinction between *in rem* and *in personam* jurisdiction and maintained that there was no impediment, statutory or otherwise, to a state's *in rem* jurisdiction over lands patented in fee. *Yakima*, 60 LW at 4070-71. Consistent with this reasoning is the proposition that the land itself carries state jurisdiction over sales and alienation and the

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[12] § 6 of the Indian General Allotment Act of 1887 is the same statute, 25 U.S.C. § 349, under consideration in the present motion.

[13] § 349 assured for "prematurely" patented land what § 5 of the General Allotment Act (25 U.S.C. § 348) implied with respect to patented land generally: land held by the patentee which was free of all encumbrances.

identity of the claimant, i.e., Tribe vs. allottee, does not affect the state's jurisdiction over the *land.*

Likewise, in the present matter, the clear language of § 2 removes the restriction on alienation if land is in fee patent and therefore subjects the land to the *in rem* jurisdiction of the state. Moreover, 25 U.S.C. § 349 is adequate to confer *in rem* jurisdiction on the State of Montana over the land in question, regardless of whether the individual allottee or the Tribe brings the lawsuit.

The Tribe argues, apart from the *Yakima* decision, that even if state law applies to individual allottees, it does not follow that state law applies to the Tribe under § 2. The Tribe asserts that when Indian tribes sue to vindicate their property rights the action is governed by federal, not state, law.[14] As a result, the Tribe argues, state-created defenses based upon the passage of time, such as statutes of limitation, adverse possession, estoppel or laches may not be applied to defeat tribal claims when such defenses would be inconsistent with federal policy. This is true only when the tribes have legitimate property rights to assert. The authority offered by the Tribe presupposes a pre-existing unsevered or unterminated property right. In the present matter, the Tribe has no legitimate property right to assert. The Tribe acknowledges it has no claim to legal title. Instead, it seeks equity, allegedly while standing in the shoes of the United States government, and brings the present action since the government has failed to bring a suit as trustee of the Tribe's interests.

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[14] For this proposition the Tribe relies on *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985) (*"Oneida II"*) and similar cases.

The problem with the position espoused by the Tribe is that a fee simply patent operates to invest the recipient with the title to the patented land, and to divest the United States of it. *Larkin v. Paugh*, 726 U.S. 431, 439 (1928). With the issue of a patent in fee, the title passed from the United States. At the same time, the prior trust and the incidental restriction against alienation were terminated. *Id.* at 439. The alienation of title also severed the authority of the Secretary of the Interior to guard the trust in the interest of the Tribe. Therefore, any questions pertaining to the title are subject to examination and determination pursuant to state law where the land rests. Once fee patents were issued on the land in question in this case, the trust relationship was terminated, likewise terminating the Tribe's ability to "stand in the shoes" of the United States government.

The Tribe's reliance on 28 U.S.C. § 2415 as the applicable statute of limitation is based on faulty premises. The Tribe's first faulty premise is that the United States *could* be a party to this action *if* it is characterized as an action to establish title to real property. This is inappropriate for the reason noted above. Not even the United States may bring an action to establish title to real property in the present case, under § 2415(c), once a patent in fee was issued. The Tribe's reliance on *Oneida II* and related cases is unpersuasive. In *Oneida II* the possessory rights being claimed were clearly federal rights to the land at issue and the tribe sued to enforce their aboriginal land rights. In the present case, the allotments and subsequent fee patents issued on the land in question extinguished any legal claim the Crow Tribe or United

States government had to the land.[15] Congressional intent to allow for the extinction of Indian title under the Allotment Act is plain and unambiguous.

The Tribe's second faulty premise in encouraging the application of § 2415 is that the United States *could* be a party to this action *if* it is characterized as an action for trespass damages under subparagraph (b). This is inappropriate for the reason noted above as well. Once a patent in fee was issued, the United States had no legal right to possession of the property, thus, any action for trespass damages would be fruitless.

By its terms, § 2415 has no application to land claims brought by an Indian tribe dealing with title to individually allotted, fee patented lands. The Tribe cites numerous cases for the proposition that an Indian tribe may bring a land claim, pursuant to § 2415(c), without concern for a statute of limitation. The cases are distinguishable from the present matter in that they involve land claims brought by the party claiming legal title to the contested lands.[16] In the present case, the Tribe acknowledges it has

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[15] I do not mean to imply by this discussion that the United States has *no* recourse once a fee patent is issued. Theoretically, the Attorney General of the United States could bring an action to cancel the previously issued patents and restore allottees to their dependent status. Such an action, if possible, however, would resolve nothing in this lawsuit. The original allottees have long since received fee patents and transferred their possessory interest in the land in question.

[16] *See*, e.g., *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979); *United States v. Minnesota*, 270 U.S. 181 (1926), involving direct tribal

no legal claim to title of the contested lands under any legal theory. In this case, the United States has patented lands to private owners in a manner which terminated its interest and subjected the grantees' incidents of ownership to determination by the applicable state law.[17]

Applying Montana's five-year statute of limitation will not conflict with federal policy in the instant case. The Tribe contends that this suit was brought to enforce federal restrictions and protections which were not removed or terminated. I find this unpersuasive, however, in light of the clear intent of Congress to remove all restraints on sale and alienability of land patented in fee to individual allottees.[18]

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title (either aboriginal or by treaty). *See also*, e.g., *Board of Com'rs v. United States*, 308 U.S. 343 (1939); *Brooks v. Nez Perce County*, 670 F.2d 835 (9th Cir.1982); *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert denied Ahtanum Irrig. Dist.*, 352 U.S. 988 (1957), involving land still held in trust status.

[17] Although state law generally does not apply to Indian property or to Indians on reservations, Congress has provided otherwise in some situations. *See*, e.g., *Williams v. Lee*, 358 U.S. 217, 220 (1959); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). It is the contention of defendants in this action that Congress has so provided in cases such as the one at bar in 25 U.S.C. § 349. I agree.

[18] Although the Tribe may vigorously protest, prior to the Indian Reorganization Act, Congress did not conclusively express an interest in preserving tribal sovereignty. The legislative background indicates that § 2 was never intended as a cause of action after fee patented land was properly sold the first time. I therefore expect defendants are correct in asserting that the Tribe has no cause of action under § 2. I expect defendants would prevail on their motion to dismiss for failure to state a claim for the same reason. It is simply unnecessary, however, to

Having found that the Tribe's action against CFC for a violation of § 2 of the Act is barred by the Mont. Code Ann. 70-19-401, I further find that there is no genuine issue as to a material fact and CFC is entitled to judgment as a matter of law.[19]

Defendants' Motion to Dismiss

Constitutional Standing

Defendants join in seeking dismissal of the complaint on the ground that the Tribe lacks constitutional standing to litigate. A determination of standing is a threshold test that must be satisfied in every federal case before a court may entertain a suit. *See, Warth v. Seldin*, 422 U.S. 490, 498 (1975). "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* A plaintiff may not invoke the powers of the federal courts unless he can meet three Article III requirements:[20] (1) that he personally suffers some actual or threatened injury, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99

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address those issues in detail since the two threshold issues dealt with in this Memorandum are dispositive.

[19] This is the case with regard to all but the 160 acres conveyed to CFC on August 8, 1989, from Thomas Campbell Bassett and John P. Murray. *See Affidavit of Ronald K. Pisk*, p. 2.

[20] Some courts seem to adhere to two requirements, with the ability to trace the injury to the challenged action and the likelihood of redress being simply two facets of a single causation requirement. *See* e.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978).

(1979)); (2) that the injury "fairly can be traced" to the defendant's putatively illegal conduct, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976); and (3) that the injury is "likely to be redressed by a favorable decision." *Id.* at 38. While the Supreme Court has admitted that these requirements are "concepts concededly not susceptible to precise definition," *Allen v. Wright*, 468 U.S. 737, 751 (1984), *reh. den.* 468 U.S. 1250 (1984), it has clearly specified that the plaintiff's injury must be "distinct and palpable," *Warth*, 422 U.S. at 501, not "abstract," "conjectural," or "hypothetical." *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

When there is no statute granting an express right of action, courts employ several other "prudential" limitations on standing to sue: (1) the plaintiff's interest must come within the "zone of interests" arguably protected or regulated by the law in question, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970); (2) the plaintiff must not allege "generalized grievances" shared in substantially equal measure by all or a large class of citizens, *See United States v. Richardson*, 418 U.S. 166 (1974), *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); and (3) the plaintiff must assert his own legal interests rather than those of third parties. *Warth*, 422 U.S. at 501.

The focus of the standing requirement is on the status of the party seeking to bring its complaint before the court, and not on the issues the plaintiff wishes to have adjudicated. *McKinney v. United States Dept. of Treasury*, 799 F.2d 1544, 1549 (Fed. Cir. 1986). A review of the complaint in the present matter reveals that the Tribe has

failed to establish its status as a party entitled to have the Court decide the dispute raised in the complaint.

First, the Tribe fails to meet the injury in fact requirement for constitutional standing. The Tribe's allegation that, "[t]he acreage limitations under Section 2 were designed to prevent large landowners from controlling and dominating the farming and agricultural economy on the Crow Reservation by acquiring vast amounts of land" it is not a personal allegation of "actual or threatened injury." It is at best a generalized allegation of the purpose behind § 2.

The Tribe's allegation that, "[t]he Defendants' violation of Section 2 of the Crow Allotment Act harms the Tribe in that it violates the public policy behind Section 2 which was to prevent one person, corporation or company from accumulating large landholdings. . . . " is not an allegation of a "concrete and immediate" injury to the Crow Tribe. It is a generalized assertion of policy considerations behind § 2 and a speculative inference of the effects of landowners owning large amounts of land.

The Tribe's allegation that, "[d]efendants' actions in violating Section 2 of the Crow Allotment Act have harmed the Crow Tribe by preventing the Tribe and its members from enjoying the use of lands within the Crow Reservation and by harming the agricultural and grazing economy within the Reservation" is merely an abstract contention of harm. The Tribe has no legal interest in the land in question. Individual members received the land by allotment and subsequently conveyed the land to bona fide purchasers. In fact, the interests of the individual Crow allottees, if any exist, are adverse to that of the

Tribe. The Tribe does not seek a return of the land to the individual allottees, but preferably to the Tribe itself. To the extent the Tribe has been precluded from the use and enjoyment of the land in question, their "controversy" is a political one, with Congress over the original Act providing for allotment to individual allottees. The Tribe is no more precluded from the use of lands within the reservation by large landholders than it is by numerous non-Indian small acreage landholders. The Tribe's allegation amounts to a veiled "controversy" over the political wisdom of the General Allotment Act. The federal judicial system is an inappropriate forum for the resolution of such a controversy. Finally, the reference to "harming the agricultural and grazing economy" by the ownership of large landholders is entirely speculative. Such general and speculative allegations do not meet Article III's injury in fact requirement.

Substantial authority exists that standing may be predicated on noneconomic injury, *see*, e.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73-74 (1978) ("environmental and aesthetic consequences"), however, the Tribe has not alleged a *concrete* injury of any kind, economic or otherwise, sufficient to confer standing.

Even if it may be rationally argued that the Tribe meets the injury in fact requirement based on vague concepts of tribal sovereignty and the expansive application standing sometimes receives in lawsuits by Indian tribes, the Crow Tribe fails to meet the requirements that the injury be fairly traceable to the illegal activity of the defendants and that the injury be fairly redressable by the remedy sought.

The Tribe's allegation of a causal relationship between its "injury" and the purchase of excess lands by the defendants requires speculation for a connection. For instance, it is highly speculative to infer that the ownership by several landowners of plots over 640 acres is in any way more harmful *to the Tribe* than the myriad non-Indian landowners of 640 acres each on the Reservation, which would be undisputedly legal under § 2. Speculative inferences are entirely necessary to connect the Tribe's alleged injury to the challenged actions of the defendants. *See, Simon,* 426 U.S. at 45-46. Moreover, the complaint suggests no substantial likelihood that victory in this suit would result in any improvement in the "agricultural and grazing economy within the Reservation," or, for that matter, any but the most abstract of benefits to the Tribe. *See, Id.*

The Tribe's reliance on *Crow Tribe v. United States,* CV No. 87-2155 (Dist. of Columbia, 1990), is ill-placed. First, the Memorandum in that case has no precedential effect on this Court. More significantly, the District of Columbia Court's "beneficiary" analysis is constitutionally deficient. The court found that "the Crow Tribe is a *beneficiary* of the restriction on alienation of land in Section 2 and, therefore, defendant's alleged failure to enforce Section 2 poses an actual or threatened risk of injury to the Tribe sufficient to confer standing. . . . " (emphasis added). Such an "injury" is far too abstract to meet the injury in fact requirements of Article III.

Prudential Standing

It is needless to determine whether the Tribe meets the subconstitutional prudential requirements for standing in

this matter. Prudential requirements for standing are not a means of conferring standing where it would not otherwise exist constitutionally. Rather, it is a limitation on standing, although the Article III requirements are met, "where no individual rights would be vindicated and to limit access to federal courts to those litigants best suited to assert a particular claim." *See, Gladstone, Realtors v. Bellwood,* 441 U.S. 91, 99, 100 (1979). In this case, the Tribe has failed to meet the minimum Article III requirements.[21]

Representational Standing

The Tribe's assertion of representative standing is baseless. It argues that it has standing to assert the rights and interests of its general membership who are allegedly adversely affected by the defendants' excess landholdings. Representative standing is established if an organization demonstrates that (1) "its members would otherwise have standing to sue in their own right;" (2) "the interests it seeks to protect are germane to the organization's purpose;" and, (3) individualized participation is not necessary for the claim asserted or the relief

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[21] Although it is unnecessary to analyze in detail, I suspect that prudential principles, as well, would counsel against conferring standing on the Crow Tribe in this matter. Under such principles, standing should be denied if a party presents "abstract questions of wide public significance" or "generalized grievances" that may be appropriately addressed by the political branches. *See, Valley Forge,* 454 U.S. at 474-75. The issues raised by the Crow Tribe in the present lawsuit are really generalized grievances over the checkerboard effect of the General Allotment Act on their Reservation – issues more appropriately discussed and resolved by the political branches.

requested. *Hunt v. Washington State Apple Advertising Com.*, 432 U.S. 333, 343 (1977). If, for the sake of argument, the Tribe is correct in asserting that "the purpose of Section 2 was to protect the interests of the Crow Tribe as a whole, not the rights or the interests of the allottees," then individual members of the Tribe would have no standing to sue. Thus, the first prong of *Hunt* is not satisfied. If, however, individual tribal members (grantors) could sue, their claims, as initially admitted by the Tribe, are clearly barred by the applicable state statute of limitation. *See, Dillon,* 341 F.Supp. at 741. In an apparent attempt to avoid this quandary, the Tribe insists on representational standing by purporting to act on behalf of its *general membership,* rather than individual Indian grantors, contending that "the Tribe and its members are inseparable" (*See* Memo In Opposition to Motion to Dismiss, p. 59, n.25). If this is true in the present context, then the Tribe is barred by the same statutes of limitation that the Tribe initially acknowledged bar individual members' claims. If, however, as the Tribe argues, it is not bound by the same statutes of limitation that bind its members, then it clearly is not acting in a representational capacity, but rather in a capacity independent of its members.

Based on the foregoing, I find that the Tribe has failed to establish sufficient standing to entitle it to have the court decide the merits of the dispute or the issues involved. Having failed to meet the threshold test of standing, the present case is appropriate for dismissal.

Accordingly,

IT IS ORDERED that CFC's motion for summary judgment is hereby granted.

IT IS FURTHER ORDERED that defendants' motion to dismiss is hereby granted as to all defendants in this matter.

The Clerk of Court is directed to enter judgment accordingly.

The Clerk is further directed to forthwith notify the respective parties of the making of this order.

DONE and DATED this 15th day of July, 1992.

/s/ Jack D Shanstrom
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS, PLAINTIFF-APPELLANT, V CAMPBELL FARMING CORPORATION; ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION, D/B/A SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY, AND; KMH RANCH COMPANY, DEFENDANTS-APPELLEES.	CA NO. 92-36612 DC NO. CV-91-00052-BLD-J ORDER (Filed Oct. 28, 1994)

BEFORE: WRIGHT, CANBY AND T.G. NELSON, CIRCUIT JUDGES.

The petition for rehearing is denied.

No. 94-1281

Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF

In The

Supreme Court of the United States

October Term, 1994

CROW TRIBE OF INDIANS,

Petitioner,

vs.

CAMPBELL FARMING CORPORATION; ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION, d/b/a SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY and KMH RANCH COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CAMPBELL FARMING CORPORATION

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Ninth Circuit properly find, pursuant to decisions of this Court, that Congress did not grant to the Crow Tribe a right of action to enforce Section 2 of the Crow Allotment Act?

2. Did the Ninth Circuit affirm the District Court's dismissal on grounds which were supported by the record?

3. Do adequate and independent bases exist for the Ninth Circuit's decision since the Tribe has no standing to pursue its claims, and those claims are barred by the statute of limitations?

LIST OF PARTIES

All parties to the proceeding below were identified in the Petition For Writ of Certiorari filed herein at pages ii and iii.

None of the corporate parties identified have any parent companies, subsidiaries (except wholly-owned subsidiaries), or affiliates that have issued shares of stock to the public that are not named parties herein.

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TO THE HONORABLE SUPREME COURT:

The Respondent, Campbell Farming Corporation, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Crow Tribe of Indians.

OPINIONS BELOW

Respondent adopts the citations to the opinions below contained in the Petition. The opinions below are reproduced in the Appendix to the Crow Tribe's Petition For A Writ Of Certiorari and all references to said opinions in this Brief In Opposition correspond to the appendix pages contained in the Petition.

STATEMENT OF JURISDICTION

Respondent Campbell Farming Corporation accepts and adopts the Statement of Jurisdiction of the Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision, Section 2 of the 1920 Crow Allotment Act, 41 Stat. 751, is reproduced at pages 2-3 of the Crow Tribe's Petition For A Writ Of Certiorari.

STATEMENT OF THE CASE

This action concerns Section 2 of the Crow Allotment Act, 41 Stat. 751 (1920), which is one of several reservation specific allotment acts enacted in furtherance of the policies underlying the Dawes Act of 1887, 24 Stat. 388, *as amended*, 25 U.S.C. § 331, *et seq.*

The history of the Crow Reservation began on May 7, 1868, with the Second Treaty of Fort Laramie. The Reservation encompasses some 2.3 million acres, mostly grazing land, although portions are usable for dryland or irrigated farming. The Crow Tribe is and has always been a stranger to the title to said lands. The lands set aside in the Treaty of Fort Laramie were for the "use" of the Crow Tribe, but title remained in the United States. *See* Article I, Treaty of Fort Laramie. Allotment of reservation lands was first prescribed in Article VI of the Treaty which provides in part:

> If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres . . .
>
> Any other person over eighteen years of age, not being the head of a family, may in like manner select . . . for purposes of cultivation, a quantity of land not exceeding eighty acres . . .

The policy of allotment continued with the passage of the Dawes Act, more commonly known as the Indian General Allotment Act (GAA). Under the GAA, lands were to be allotted to individual Indians but the United States would hold legal title for 25 years after which a fee patent would issue to the allottee or his heirs. Ch. 119, 24 Stat. 388 (1887).

The Crow Allotment Act was passed into law in 1920. Under the CAA, lands within the Reservation were to be allotted to individual Crow Indians as follows:

> [O]ne hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to prorate the remaining unallotted allottable lands and allot them so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allottable tribal lands for his total allotment of land of the Crow Tribe.

Section 2 of the CAA contains restrictions on the conveyance of allotted parcels by the allottees. Specifically, the provision prohibits conveyances from the allottee to any non-Indian who already owns at least six hundred and forty acres of agricultural, or one thousand two hundred and eighty acres of grazing, land within the Reservation, or to any person who would, as a consequence of the conveyance, own more than one thousand two hundred and eighty acres of agricultural land, or one thousand one hundred and twenty acres of grazing land, within the Reservation.[1] Section 2 limits the power of the Secretary of the Interior to approve conveyances which would violate the acreage limitations. Section 2 also declares void any such conveyance, and imposes criminal liability on any grantee

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1. As originally enacted, Section 2 prohibited approval of any conveyance exceeding the acreage limitations — even to another Tribal member. Congress amended the provision in 1940 to allow purchases of any size by Indians in order to facilitate consolidation of family ownership. *See* 54 Stat. 252 (1940).

involved in such a transaction. Although Section 2 prohibits conveyances by Indians which exceed the acreage limitations, nothing contained therein prohibits ownership beyond those limitations.

Today some 650,000 acres are held by non-Indians, mostly farmers or ranchers, many of whom work lands which have been in their families for years. At present, the Crow Reservation is characterized by a "checkerboard" of ownership similar to that of most western reservations which were subject to the allotment policy. The distribution of ownership in 1980 was described by this Court in *Montana v. United States*, 450 U.S. 544, 548 (1981):

> . . . roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent.

The Tribe is nowhere mentioned in Section 2, nor was the Tribe an intended beneficiary of the salutary effects of this provision since it, along with every tribe covered by the Dawes Act and its progeny, was to pass out of existence once the goals of the allotment policy were achieved. The congressional purpose behind the allotment policy was the assimilation of individual Indians into general society and the elimination of Indian tribes.

Although congressional policy changed with the passage of the Indian Reorganization Act of 1934, the provisions of that statute were to have no force or effect over lands previously allotted pursuant to the Dawes Act and its reservation specific offspring. 25 U.S.C. § 461; *See also Brendale v. Confederated*

Yakima Nation, 492 U.S. 408, 432 (1989). Consequently, the allotment of lands which followed passage of the Crow Allotment Act was a *fait accompli* which would not be reversed even with the new direction in Indian policy evidenced by the Reorganization Act.

In 1991, the Crow Tribe, an entity which would no longer exist had the goals of the allotment policy been achieved, asserted its alleged rights under Section 2.[2] The Tribe contends that Section 2 actually limits the amount of land a non-Indian may own within the Reservation. The landowners disagree with this interpretation of the statute, and instead assert that Section 2 merely prohibits conveyances by the original allottees to non-Indians in excess of the acreage limitations. Although the Tribe has attempted throughout the litigation to avoid discussion of the remedies to be fashioned in the event it succeeds, it is apparent that the Tribe has pursued this case in hopes the Courts will quiet title in the Tribe even though the allotted lands were never owned by the Tribe, but were instead granted to individual Crow Indians.[3]

The District Court dismissed the Tribe's claims on grounds it

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2. Both the Tribe and the Government have been aware of Section 2 since passage of the Crow Allotment Act, yet neither brought suit under the provision for over 70 years, until the Tribe initiated this action. In the meantime, non-Indian landowners have labored to improve and increase the value of their properties and could be dispossessed without compensation should the Tribe prevail in this case.

3. Claims by individual allottees under Section 2 have been held subject to Montana's five year statute of limitations. *Dillon v. Antler Land Co.*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 941 U.S. 992 (1975). The *Dillon* Court found that the GAA subjected lands which had been patented in fee to state law. It was in part on the basis of *Dillon* that the District Court concluded that the Crow Tribe's Section 2 claims were untimely under Mont. Code Ann. §§ 70-19-401, 402 (1991).

could not satisfy the constitutional requirements for standing. The District Court found that the Tribe could not establish that it suffered an injury from the alleged violations of Section 2, which provision was directed at transactions between allottees and potential purchasers. Vague and speculative claims that the presence of large landholders hurt the Tribe, or that the public policy behind Section 2 was to prevent accumulation of large landholdings, fell short, the District concluded, of proving the type of concrete injury that is a prerequisite to standing. (App. 29).

The District Court also concluded that the Tribe's claims against Campbell Farming Corporation were barred by the statute of limitations. Pursuant to 25 U.S.C. §§ 347 and 349, Montana's five year statute was to govern Section 2 claims since Congress subjected all allotted lands, once patented, to the authority of state law pursuant to those provisions of the Dawes Act. App. 22. The District Court found additional support for its conclusion in this Court's 1992 decision, *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S.__, 112 S.Ct. 683 (1992). The District Court read *Yakima* to have drawn a distinction between state *in rem* versus *in personam* jurisdiction, and concluded that state law governs cases *in rem* "whether the individual allottee or the Tribe brings the lawsuit." (App. 23). Following that line of reasoning, the District Court held that the Montana statute of limitations barred all claims not brought within the five year limitations period.

The United States Court of Appeals for the Ninth Circuit affirmed on grounds the Tribe had no right of action under Section 2. In a unanimous opinion authored by Judge Canby, the Circuit Court held that under rules promulgated by this Court for determining whether Congress intended a party to have a right of action to enforce a statute, the Tribe could not prosecute this suit. Citing *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Circuit Court

concluded that the language and remedial structure of Section 2 indicated "that Congress did not intend to vest the Tribe with a cause of action...". (App. 9). The Circuit Court also reviewed the legislative history of Section 2 and found further support for the conclusion that the Tribe had no right of action. (App. 10). The Tribe's petition for rehearing was denied without comment.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT PROPERLY APPLIED THE DECISIONS OF THIS COURT IN HOLDING THAT THE TRIBE HAD NO RIGHT OF ACTION UNDER SECTION 2.

A. The Tribe Could Not Establish Either That It Was Part Of The Class For Whose Especial Benefit Section 2 Was Enacted.

In *Cort v. Ash, supra*, 422 U.S. at 78, this Court set out a four part test for determining whether Congress intended a plaintiff to enjoy a private right of action to enforce a statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? (citations omitted).

In concluding that the Crow Tribe had no right of action, the Ninth Circuit reviewed Section 2 under the first and second prongs of the *Cort* test.[4]

The Circuit Court began its analysis of the *Cort* factors by examining the language of Section 2. The Circuit Court observed that one important indication that Congress did not intend to afford the Tribe a right of action is that the Tribe is not among the "actors mentioned in Section 2." (App. 6). While the Tribe's omission "is not conclusive . . . ," (App. 6), this Court has noted that a critical fact in determining whether Congress intended that a given plaintiff enjoy a right of action is "language [which] . . . explicitly confers a right directly on a class of persons that include[s] the plaintiff in the case." *Universities Research Association*, 450 U.S. at 771-772 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979)).

As the Circuit Court noted, only Indians in their individual capacities are referred to in Section 2. The Tribe is not mentioned nor is there even a general reference to "Indians." (App. 6). The statute benefits individual allottees who happen to be Tribal members, but bestows no rights upon the Tribe, which entity was to cease to exist once the goal of assimilation was reached. In addition, the Tribe was a stranger to the title on the allotted lands so had no interest in the conveyances between allottees and potential purchasers with which Section 2 is concerned.

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4. Although the Tribe takes exception to the Circuit Court's failure to consider the third query, *i.e.*, whether a tribal cause of action would be consistent with the legislative scheme, *See* Petition, p.17, this Court has held that when plaintiff is not among the class especially benefited by the statute, and the legislative history provides no indication the plaintiff enjoys a right, "the remaining two *Cort* factors cannot by themselves be a basis for implying a right of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 580 (1979) (Brennan, J. concurring), *accord Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 770, n.21 (1981).

Congress did not and could not have intended that the Tribe have a right of action under the circumstances. The Circuit Court was correct in holding: "The use of such specific terms in the statute suggests that the statute was enacted for the benefit of a group of individuals, each of whom is a member of the Tribe, and not for the benefit of 'the Tribe.' " (App. 6).[5]

B. The Remedial Structure Of Section 2 Indicates The Tribe Has No Right Of Action.

The second basis for the Circuit Court's finding that the Tribe had no right of action to enforce Section 2 was the narrow and specific remedial structure of the provision. Section 2 provides three mechanisms for preventing sales in violation of the acreage limitations: 1) the Secretary of the Interior was to refuse to approve conveyances which violated the acreage limitations; 2) any purchaser who bought land in excess of the limitations was liable for a misdemeanor; 3) the allottee could bring a civil action to have the conveyance declared void. Neither

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5. It is important to understand that Congress could not have intended that the Tribe have a right of action since "The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." *County of Yakima v. Yakima Nation*, 502 U.S. at __, 112 S.Ct. at 686 (citing *In re Heff*, 197 U.S. 488 (1905)). The Tribe was to pass out of existence pursuant to both the Dawes Act and the Crow Allotment Act, and would not have existed to act as a plaintiff had congressional goals been achieved.

Congressional policy changed in 1934 with passage of the Indian Reorganization Act. However, Section 2 must be interpreted in light of the policy's extant at its passage, not in regards to subsequent congressional actions. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978). Moreover, as to the lands here at issue, which were previously allotted parcels, "Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands." *County of Yakima*, 502 U.S. at __, 112 S.Ct. at 686.

the prohibition on approval of excess conveyances by the Secretary, nor the power to prosecute the misdemeanor charges, were functions intended by Congress to be carried out by the Tribe. (App. 6). Consequently, the Circuit Court concluded that if the Tribe had any toehold in the statute it must be to sue to "void" transactions in violation of Section 2. But, as the Circuit Court recognized, the remedial structure of Section 2 indicates that the Tribe, a stranger to title, has no such right. The Tribe was not party to the transactions, did not own the transferred land, and even if a successful claim were brought it would be the allottee, not the Tribe, who would benefit since lands upon which title was held void would be restored to the allottee.

The Tribe takes issue with the Circuit Court's conclusion that the lone remedy available under Section 2 is an action to void any unlawfully transferred title.[6] However, the authorities cited by the Tribe actually support the Circuit Court's conclusion that

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6. The Tribe's contention that the remedies issue is complex, Petition, p.16, is at odds with the unambiguous language of Section 2. Moreover, the Tribe's citation to *Franklin v. Gwinnett County Public Schools*, 503 U.S. __, 112 S. Ct. 1028 (1992), for the proposition that courts can freely fashion remedies is utterly misplaced. In *Franklin*, this Court reached several conclusions which are inconsistent with the Tribe's contentions. First, the Tribe seeks to establish its power to sue by setting the remedies horse before the cart of Congressional intent. As the *Franklin* Court declared, "the question of whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." 503 U.S. at __, 112 S. Ct. at 1034 (quoting *Davis v. Passman*, 442 U.S. 228. 239 (1979)). The Tribe's suggestion that the remedies under Section 2 are open to discussion is not germane to the question of whether Congress intended it to have a right of action under Section 2. Further *Gwinnett* involved the party harmed and on whose behalf the action was filed. In this case the Tribe, which is not a beneficiary of Section 2, seeks the right to bring an action. Lastly, in *Gwinnett* the Court had the power to fashion an appropriate remedy because the statute at issue was "silent on the question of remedies . . ." *Id.* Section 2, on the other hand, unambiguously declares that the allottee may sue to void title. *Gwinnett* is of no relevance to the instant case.

the remedy afforded by Section 2 rests exclusively in the allottee. In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the Court considered whether a merger contract obtained pursuant to defective proxies was *per se* void under Section 29(6) of the Securities Exchange Act. The Court held that the guilty party is prohibited from enforcing the contract against an unwilling innocent party, and in this sense the contract is void, but the innocent party may nevertheless enforce the contract if he concludes to do so would be in his best interest. 396 U.S. at 388. In this latter sense the Court drew the conclusion that void could mean voidable.[7]

As for this case, the allottee who conveys property in violation of Section 2 enjoys the same option since he may conclude that a suit to void title is contrary to his best interests. However, it is the allottee who is empowered to make the decision, not a third party stranger, such as the Tribe. Section 2 affords the individual a choice, but does not grant to the Tribe a right to make the choice for the allottee.[8]

An additional difficulty with the Tribe's reasoning is that Section 2 unambiguously restricts the right of action to the

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7. Other cases relied upon by the Tribe are equally supportive of the Ninth Circuit's decision. In *Ewell v. Daggs*, 108 U.S. 143 (1883), the Court left it to the victimized party whether to seek to void a contract which violated a Texas usury statute. Similarly, in *Atlantic Coast Line Railroad Co. v. State of Florida*, 295 U.S. 301 (1935), those who paid charges levied under a voidable Interstate Commerce Commission order were able to claim the sums paid as an equitable remedy. But in each case, the party involved in the transaction was afforded the right to seek the remedy.

8. The Tribe tacitly acknowledges that the Circuit Court was correct in holding that the Tribe has no cause if the only remedy for a violation of Section 2 is to void the title. The Tribe's argument that "void" does not necessarily mean the transaction is a nullity indicates that the Tribe is aware that a void title would revest the lands in the allottee, hence no benefit would run to the Tribe.

allottee. *California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide); *See also National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("when legislature expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."). The question of whether a statute confers a right of action on a particular plaintiff is a matter of statutory construction. *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981). Statutory interpretation begins "with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (citing *Park'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)). The language of Section 2 leaves no room for debate as to Congress' intent; the remedy is solely in favor of the individual allottee. The Tribe has no right of action under Section 2 and the petition for a writ of certiorari is properly denied.

II. THE LEGISLATIVE HISTORY BEHIND SECTION 2 ESTABLISHES THAT THE INDIVIDUAL ALLOTTEES ALONE ARE EMPOWERED UNDER SECTION 2 TO BRING AN ACTION.

A. The Legislative History Demonstrates That The Allottees Were To Assume Responsibility For Protecting Their Property Rights.

The Tribe, in an effort to confuse the issues concerning whom Congress intended would have a cause of action under Section 2, contends that the Ninth Circuit erred by ignoring this Court's precedents concerning "tribes" versus "tribal members." The Tribe contends that if Section 2 was designed to protect

individual allottees, who would be members of the Crow Tribe, then it, like any government, should have a right to bring a cause to protect its citizens.

The Tribe ignores the fact that it was Congress which drew the distinction between allottees and the Tribe in enacting both the Crow Tribe Allotment Act and the Dawes Act, for it was indisputably the goal of the allotment acts to terminate Indian tribes and assimilate members into general society. The process of assimilation was designed to create in the individual allottees both an appreciation for their rights as property owners and an understanding that they alone were responsible for protecting those interests. The Circuit Court was attuned to Congressional intent in observing "Even under the Tribe's interpretation, the Act was drafted to make individual Indians more independent and to encourage them to become reliant on their own individual parcels of land." (App. 9). In view of Congressional goals in effect at the time the CAA was enacted into law, the Circuit Court was surely correct in reaching the conclusion that "it is reasonable to assume that Congress expected individual Indians to bring their claims in their own behalf, rather than expect the Tribe to protect their right." (App. 21).

The legislative history bears out the Circuit Court's conclusions. As a general summary of the legislative goals underpinning the allotment acts this Court has observed:

> The policy of the Acts was the eventual assimilation of the Indian population . . . and the "gradual extinction of Indian reservations and Indian titles." *Draper v. United States*, 164 U.S. 240, 246, 41 L. Ed 419, 17 S. Ct. 107. The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was

> designed to eventually eliminate tribal relations ... And throughout the congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian population was to be accomplished, in part, by the dissolution of tribal relations ...

Montana v. United States, 450 U.S. at 559, n.9.[9]

The legislative history of the Crow Allotment Act establishes that the communal system which had characterized tribal life, and in the midst of which tribal government would have functioned, was to be "abandoned as speedily as possible." S. Rep. No. 219, 66th Cong., 1st Sess. 5 (1919). The purpose of the Crow Allotment Act — assimilation of Indians and extinction of the Tribe — could only be accomplished if the allottees assumed responsibility for protecting their own rights:

> The bill provides that those who are competent shall be placed upon their own resources and be given all their property and all the rights and privileges of citizenship under proper safeguards. It also provides for those not yet fully competent, and that these may as rapidly as possible be made

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9. The *Montana* Court further noted: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." It defies common sense also to expect that Congress intended a right of action in the Tribe to protect the interest of individual allottees, when those allottees were to be assumed into the general population, subjected to state law, and the tribes were to cease to exist.

> independent of the guardianship exercised over them by the United States Government, and be given that *individual responsibility which is the ultimate achievement aimed at in the proper settlement of what is known as the Indian problem.* (emphasis added)

59 Cong. Rec. H5999 (April 22, 1920) (Comments of Congressman Riddick).

It is wholly disingenuous for the Tribe to contend that the Circuit Court drew some rigid distinction between the Crow Tribe and its members; that distinction was drawn 75 years ago by Congress in enacting the Crow Allotment Act. Congress sought to put an end to the Crow Tribe and to create in each individual allottee a sense of responsibility for protecting his property rights the same as any other citizen in the United States.[10]

B. Cases Cited By The Tribe Are Immaterial Since Congress, Not The Court Below, Drew The Distinction Between The Crow Tribe And The Allottees.

The Tribe's reliance on *Arizona v. California*, 460 U.S. 605 (1983), for the proposition that Tribal participation is encouraged in lawsuits which affect their rights begs the question of whether

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10. Indeed, in footnote 12 of its brief, the Tribe abandons any pretense that it is seeking to protect the rights of the individual allottees in bringing suit. As the Tribe notes, the individual allottees' sole interest in determining whether to sell the property is to maximize the price. As a result, the individual allottees may have no desire to sue to enforce Section 2. That, of course, is precisely the point. Section 2 leaves it up to the individual allottee to determine whether his interests are best protected by bringing an action. The Tribe would superimpose its will on all allottees by bringing an action for their so-called benefit, taking title to the land itself, and freezing out the very individuals whom the Tribe contends it wishes to protect.

Congress intended the Tribe to have a right of action under Section 2. As this Court has so often explained, the issue is not whether the decision will have an effect on the plaintiff, *California v. Sierra Club*, 451 U.S. 287, 294 (1981) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 690-693, n.13 (1979)), but rather did Congress intend plaintiff to have a cause of action to enforce the statute? *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979). While the Tribe may assert some abstract interest in the effect of Section 2, the language and structure of the statute, especially when considered in connection with the goal of tribal extinguishment, are an insuperable barrier to establishing that Congress intended the Tribe to enjoy a right of action.

As for *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1975), several observations are in order. While the Tribe in *Puyallup* had a direct interest in enforcing the treaty rights at issue, here the Crow Tribe asserts claims which concern lands to which it was never titleholder and which were transferred to manifold separate individuals. In addition, the Crow Tribe now acknowledges that it seeks relief which may be contrary to the best interests of the allottees.[11] Finally, the Tribe cannot have a corporate interest to protect when the very provision it seeks to enforce is contained in a statute designed to extinguish the Tribe.

The Tribe's contention that decisions of this Court suggest that tribes have broad responsibility for protecting their members, while perhaps true in the abstract, flies in the face of express congressional policy under the Dawes Act and Crow Allotment Act. The Tribe's belief that it occupies the same position as, to use the Tribe's example, the City of Los Angeles, whose citizens might be the beneficiaries of an earthquake relief

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11. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), illustrates that rights under a statute are limited when Tribal interests conflict with those of members. Such a conflict is now acknowledged by the Tribe. Petition, 18 n.12.

bill which the city should itself be allowed to enforce, is meritless because, while earthquake relief may have some benefit to the City as well as its residents, the Crow Allotment Act was specifically designed to destroy the communal relations amongst Indians and tribes and to assimilate tribal members into the general body politic. The Circuit Court rightly found that the Tribe has no right of action under Section 2, and the petition for a writ of certiorari should be denied.[12]

III. THE TRIBE HAD AMPLE OPPORTUNITY TO ADDRESS THE ISSUE OF WHETHER IT ENJOYED A PRIVATE RIGHT OF ACTION UNDER SECTION 2 IN THE LOWER COURTS.

Every Circuit Court in the country has recognized the rule that an appellate court may affirm on any ground finding support in the record. *See, e.g., Inmates of Supple County Jail v. Rufo*, 12 F.3d 286 (1st Cir. 1993), *on remand*, 844 F. Supp. 31 (D. Mass. 1994); *Railway Labor Executives Association v. Staten Island R.R. Corp.*, 792 F.2d 7 (2nd Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987); *Fairview Township, York County, Com. of Pa. v. U.S. Environmental Protection Agency*, 773 F.2d 517 (3rd Cir. 1985); *Jackson v. Kimel*, 992 F.2d 1318 (4th Cir. 1993); *SIDCO Products Marketing, Inc. v. Gulf Oil Corp.*, 858 F.2d 1095 (5th Cir. 1988), *reh'g denied*, __ F.2d __ (1988); *United States v. Anderson County, Tennessee*, 761 F.2d 1169 (6th Cir. 1985), *cert. denied*, 474 U.S. 919 (1985); *McCarthy v. Kemper Life Insurance Companies*, 924 F.2d 683 (7th Cir. 1991); *Campbell v. Commissioner of Internal Revenue*, 943 F.2d 815 (8th Cir. 1991); *Suydam v. Reed Stenhouse of Washington, Inc.*, 820 F.2d 1506, 1508 (9th Cir. 1987); *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir.

12. The Tribe's contention that 28 U.S.C. § 1362 affords it a private right of action is inapposite. Section 1362 is merely a jurisdictional statute and does not create a right of action in the Tribe. *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

1990); *Barnett v. Bailey*, 956 F.2d 1036 (11th Cir. 1992); *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986). This Court has recognized the rule on various occasions. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 326 (1986) (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977)); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937), *reh'g denied*, 302 U.S. 781 (1938). The Tribe contends that it was given no opportunity to address the question of whether Congress intended it to enjoy a right of action under Section 2. If, however, the record discloses that the issue was addressed in the lower courts, the Tribe's "fairness" issue is exposed as a red herring.

The Tribe fails to explain that in the nearly 450 pages of briefing presented to the District Court numerous pages included discussions of *Cort v. Ash* and similar tests, and addressed specifically the question of whether the Tribe was intended to have a private right of action under the statute. The matter was also briefed in detail before the Ninth Circuit, with each of the parties specifically citing the *Cort* test and discussing its implications. And, although the Tribe contends that the matter was not raised at the hearing before the Circuit Court, the transcript of the argument establishes that the issue was discussed in detail.[13] In addition, the Tribe had an opportunity to reargue the issue in its petition for rehearing. Therefore, the contention that the Tribe was denied an opportunity to fairly address the issue upon which the Circuit Court rendered its decision flatly misconstrues the record.

As noted above, the Circuit Court was free to affirm the

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13. All briefs that were presented to the District and Circuit Court have been lodged with this Court. Oral arguments before the Ninth Circuit are not stenographically recorded so defendants secured a copy of the tape of the argument, and lodged the transcript with the Court.

District Court on any ground supported by the record. The Tribe argued the applicability of *Cort v. Ash* test and responded to the arguments made by defendants. The Ninth Circuit worked no unfairness on the Tribe in deciding the case on the basis of *Cort v. Ash* and in holding that Congress did not intend to create a right of action in the Tribe.

IV. THE NINTH CIRCUIT'S DECISION COMPORTS WITH PREVIOUS DECISIONS FROM THIS COURT, AND THE TRIBE'S PETITION FAILS TO IDENTIFY A QUESTION WHICH NEEDS TO BE SETTLED BY THIS COURT.

This Court has repeatedly declared that the purpose behind the Dawes Act and the allotment policy was the "elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant culture." *Duro v. Reina*, 495 U.S. 676, 691 (1990); *County of Yakima*, 502 U.S. at __, 112 S.Ct. at 686; *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 423 (1989); *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). Leading commentators, too, have recognized that the goal of the allotment acts was both the assimilation of Indians and the extinction of reservations, with the individual allottees assuming the rights and obligations of citizens. F. Cohen, *Handbook Of Federal Indian Law*, 130-132 (1982 Ed.); W. Canby, *American Indian Law 2d*, 19-22 (1988). Given the complementary goals of tribal extinction and assimilation, the Ninth Circuit properly concluded that the burden of enforcing any civil remedy provided for under Section 2 fell on the individual allottees. Since allottees were to be absorbed into society and would no longer be members of the Tribe, it would be incongruous for Congress to intend that the Tribe enjoy a right of action to protect the interests of the allottees.

Consequently, the Circuit Court's determination that

individual Indian allottees alone have a right of action to enforce Section 2 is consistent with this Court's prior rulings concerning the policy of allotment. Both because the Dawes Act and Crow Allotment Act were targeted towards destruction of the tribes, and because allottees were to assume responsibility for protecting their own interests in the land, when considered in concert with Section 2's silence as to any right of action enjoyed by the Tribe, the Ninth Circuit's holding that the Crow Tribe has no right of action to enforce Section 2 is correct. The petition for a writ of certiorari should be denied.

Moreover, the issues presented by this case are of no national importance and need not be resolved by this Court. Section 2 of the Crow Tribe Allotment Act is unique to the Crow Reservation, hence the construction of the provision will have no effect on any other Indian tribe, nor be of any general importance to Indian jurisprudence. The Ninth Circuit decision was correct, and no injustice has been worked upon the Tribe since under the clear provisions of Section 2 the Tribe has no right of action. The Circuit Court's decision dovetails exactly with the decisions of this Court concerning the allotment acts. There are no grounds upon which to grant the petition.

V. THE TRIBE'S ALLEGATIONS OF A CONFLICT BETWEEN THE NINTH CIRCUIT DECISION AND DECISIONS OF OTHER CIRCUIT COURTS IS AN ILLUSION.

Although it is somewhat difficult to pinpoint the conflict between the Circuits upon which the Tribe rests its petition, the Tribe seems to suggest that other Circuit Courts have chosen not to search for specific evidence Congress intended to create a right of action in a given entity. (Petition, p. 20). The Tribe contends that in conducting such an inquiry the Court below acted as a maverick. According to the Tribe, "this aspect of the Court of Appeals' decision is unique and conflicts with the analytical

approach to the cause of action issue and the decisions of other federal appellate courts." (Petition p. 20).

In reality, the decision of the Court below is exactly consistent with the approach taken in the very decisions upon which the Tribe relies. For example, in *American Telephone & Telegraph Co. v. M/V Cape Fear*, 967 F.2d 864, 870 (3rd Cir. 1992), the Third Circuit, relying on the rules enunciated by this Court, held that the existence of a private right of action must be found "in the substantive provisions of the statute." 967 F.2d at 869. Said the *American Telephone & Telegraph* Court, "The primary source of a private right of action is the text of a statute." 967 F.2d at 866. The Ninth Circuit's conclusion that the omission of the Tribe from Section 2 is indicative of Congress' intentions is thus in accord with the reasoning of *American Telephone & Telegraph* Court.

In addition, the *American Telephone and Telegraph Court* read *Cort v. Ash* to require:

> . . . that in the absence of an explicit right of action, one may be implied only if there is either a "clearly articulated federal right in the plaintiff" or a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard."

967 F.2d at 870 (quoting *Cort v. Ash*, 422 U.S. at 82). The *American Telephone & Telegraph* Court, while noting that statutes rarely identify their beneficiaries, concluded that although plaintiffs may have been beneficiaries of the Submarine Cable Act of 1888, they could not establish the requisite "clearly articulated" right to bring an action. *Id.* This, of course, is precisely the conclusion reached by the Circuit Court in this case. The alleged conflict between the analytical framework adopted

by the Court below and that pursued by the Third Circuit in *American Telephone & Telegraph* is nonexistent.

The *American Telephone & Telegraph* decision is the only case cited by the Tribe which might in any way suggest a conflict between the circuits,[14] although the Tribe contends that the Ninth Circuit should have observed that Section 2 was designed to benefit Tribal members and therefore the Tribe should have been given a right to enforce the provision for its members. Aside from the previously discussed incongruity in the Tribe's position that it should be allowed to sue to "protect" the rights of allottees by

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14. The Tribe's reliance on *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701 (1st Cir. 1977), is not only misplaced but misconstrues the holding in that case. Rather than holding that the plaintiff in that case had an implied right of action, the Court actually concluded that although Comtronics was "within the class of intended beneficiaries" of the relevant section of the Communications Act of 1934, 553 F.2d at 705, still the plaintiff had no implied right to seek damages because of "a clear legislative intent to preclude such a remedy." *Id.* Moreover, the *Comtronics* Court was expressly in agreement with the view that in determining congressional intent to create a private right of action the ancient principle of *expressio unius est exclusio alterius* applied, and that courts would not expand statutory remedies beyond the coverage expressed in the statute. 533 F.2d at 707 (citing *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 458, 470-71 (1974)). The Ninth Circuit applied the same rule in concluding that, based on the remedy afforded by the statute, the Tribe had no implied right of action.

So, too, in *Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n, Inc.*, 989 F.2d 1266, 1268 (1st Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 634 (1993), the Court, citing *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 532-33 (1989), stated that the "central focus must be on Congressional intent." Although the Court in *Sterling Suffolk* concluded that plaintiff was within the class which would especially benefit from the statute, the statute at issue "explicitly" identified the parties who could bring a claim and plaintiff was not among them. 989 F.2d at 970. In this case, Section 2 also specifically identifies those who may bring a claim and the Tribe is not one of them.

taking title and dispossessing them, the Tribe fails to explain how this constitutes a conflict between the Circuits. In reality, every Circuit Court applies *Cort v. Ash* to require that a private right of action must be found in the substantive provisions of the statute. As this Court has made clear "the question is the nature of the legislative intent in forming a specific statute, and Cort set out the criteria through which this intent could be discerned." *Davis v. Passman*, 442 U.S. 228, 241 (1979). In this case, the Circuit Court applied precisely the proper test and followed the analytical framework laid down by this Court and adhered to by all the Circuits. There is no conflict between the decision of the Ninth Circuit and those rendered by other circuit courts and therefore no basis to grant the petition.

VI. ADEQUATE AND INDEPENDENT BASES SUPPORT THE DECISION OF THE CIRCUIT COURT SINCE THE TRIBE LACKS STANDING AND ITS CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

A. The Tribe Was Without Constitutional Standing And Therefore The Federal Courts Lack Jurisdiction To Hear The Claim.

In recent times, this Court has developed the doctrine of standing to insure that federal courts address only those matters "historically viewed as capable of judicial resolution," and involving actual "cases and controversies". *Flast v. Cohen*, 392 U.S. 83, 101 (1968). To satisfy the requirements for Article III standing, this Court has long insisted that plaintiffs meet three criteria. First, plaintiff must personally demonstrate "an 'injury in fact' which is concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. __, 112 S.Ct. 2130, __ (1992); *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 472 (1982) (citing

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). That injury must "fairly . . . be traced" to the defendant's putatively illegal conduct, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976), and lastly, the injury must be "likely to be redressed by a favorable decision." *Id.* at 38. Although these minimum requirements are admittedly "not susceptible to precise definition," *Allen v. Wright*, 468 U.S. 737, 751 (1984), *reh'g denied*, 468 U.S. 1250 (1984), the Tribe was obliged to demonstrate that it suffered an injury which is "distinct and palpable." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

As has been emphasized throughout the litigation, the Tribe was to pass out of existence pursuant to the Crow Allotment Act, was a stranger to the title to the allotted parcels at issue in this lawsuit, and is nowhere mentioned in Section 2. The mere fact that the Tribe asserts an injury, especially an injury that is as amorphous and imprecise as that herein alleged, will not satisfy the first prong of the standing test.[15]

The District Court recognized the weakness in the Tribe's position as follows:

> The Tribe's allegation that "[t]he acreage limitations under Section 2 were designed to prevent large landowners from controlling and dominating the farming and agricultural economy on the Crow Reservation by acquiring vast amounts of land" it is not a

15. Even before this Court, the Tribe is unable to demonstrate any injury-in-fact sustained by it, but instead relies on the vague claim that large land holdings affect Tribal members who remain on the Reservation and earn a livelihood from the land. The District Court correctly held that such a claim is far too speculative (App. 29). The Tribe cannot forge the first link in the standing chain: an injury-in-fact.

> personal allegation of "actual or threatened injury." It is at best a generalized allegation of the purposes behind § 2.
>
> The Tribe's allegation that "[t]he Defendants' violation of Section 2 of the Crow Allotment Act harms the Tribe and that it violates the public policy behind Section 2 which was to prevent one person, corporation or company from accumulating large landholdings . . ." is not an allegation of a "concrete and immediate" injury to the Crow Tribe. It is a generalized assertion of policy considerations behind § 2 and the speculative inference of the effects of landowners owning large amounts of land.

(App. 29).

As this Court has repeatedly noted, abstract and conjectural injuries are not sufficient to satisfy the threshold requirements of Article III standing. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The District Court properly characterized the Tribe's allegations as speculative. Therefore, since the Tribe cannot satisfy Article III standing requirements, the Circuit Court decision should be upheld and the petition for a writ of certiorari denied.[16]

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16. The Tribe's contention that it could sue to vindicate the rights of individual allottees is forbidden on prudential standing grounds. *Allen v. Wright*, 468 U.S. at 751. As this Court noted in *Allen*, suits to enforce the rights of others fall within the "general prohibition on a litigant raising another person's legal rights." *Id.*

B. The Tribe's Claim Is Barred By The Applicable Statute Of Limitations.

For over twenty years, non-Indian landowners inside the Crow Reservation have relied on a Ninth Circuit decision, *Dillon v. Antler Land Co., supra,* 507 F.2d 940, for the rule that Section 2 claims must be brought within the five-year statute of limitations provided by Montana law. As the Ninth Circuit Court of Appeals explained in affirming the District Court's conclusion in *Dillon*:

> This appeal raises troublesome questions, but that Montana law governs with respect to Appellant's property rights herein is not one of them. 25 U.S.C. § 349, relied on by the District Court in holding that Appellant's first claim is barred by the Montana Statutes of Limitation could scarcely be more explicit in this respect.

507 F.2d 942.

The Montana statute of limitations applies to the lands here at issue because Congress expressly provided that land patented in fee or sold by supervised sale would be governed by state law. *See* 25 U.S.C. §§ 347 and 349; *County of Yakima*, 502 U.S. __, 112 S.Ct. 683. The Tribe flatly admits that its right, if any, to bring a claim is as "the representative of its members." (App. 21).[17] The Tribe, which claims the power to bring this action to

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17. The Tribe's reliance on *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977), wherein the Tribe sought to protect not only its own rights but that of individual members, establishes that the Tribe, which by its own admission is seeking to enforce rights enjoyed by individual members of the Tribe, should therefore be subject to the same defenses as the individual allottees.

vindicate the rights of individual allottees, is barred by that same statute of limitations.

That the Montana statute of limitations should operate to bar the Tribe's claims as well as those of individual allottees is illustrated by this Court's decision in *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 507 (1986). In *Catawba*, the Tribe's constitution had been terminated and Tribal members were made subject to state law. 476 U.S. at 505. Federal trust protections for the Catawba Tribe were discontinued and individual Tribal members were no longer afforded the special protections of federal Indian law. The Catawba Tribe nonetheless sued to recover a sizeable tract of land, but this Court concluded that such claims were governed by the state limitations period.[18]

Like the Tribe in this case, the Catawbas contended that while claims made by individual Tribal members might be subject to the state limitations period, the Tribe itself was not subject to state law under the terms of the Catawba Act. This Court reversed an appeals Court decision which adopted the Tribe's reasoning and noted "It would be most incongruous to preserve special protections for a Tribe whose constitution has been revoked while withdrawing protection for individual members of that Tribe." 476 U.S. at 507. The Court concluded: "Without special federal protection for the Tribe, the state statute of limitations should apply to its claims in this case." 476 U.S. at 507.

In precisely the same manner the Dawes Act and the Crow Allotment Act altered the relationship between the Crow Tribe

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18. The Court did not reach the issue of whether the limitations statute actually barred the claims, instead remanding the case to the Circuit Court which was "in a better position to evaluate such an issue of state law." 476 U.S. at 511.

and the national government. The Crow Tribe was to cease to exist, its members were to be assimilated into society at large, and federal trust protection was to end, with state law to become the governing law in allotment cases. The Montana statute of limitations properly bars the claims brought by the Crow Tribe.[19]

CONCLUSION

The Circuit Court reached the appropriate conclusion in determining that Congress did not intend that the Tribe enjoy a right of action to enforce Section 2. Given the full airing of the issues in the Courts below, the Crow Tribe's petition for a writ of certiorari should be denied.

Respectfully submitted,

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19. Campbell Farming Corporation offered an uncontroverted affidavit at the District Court which established that, with the exception of one small parcel purchased from a *non-Indian*, there had been no conveyances of allotted land in the five years preceding the filing of the complaint.

OPPOSITION

BRIEF

(3)

No. 94-1281

Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CROW TRIBE OF INDIANS,

Petitioner,

vs.

CAMPBELL FARMING CORPORATION; ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION d/b/a SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY and KMH RANCH COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION D/B/A SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY; KMH RANCH COMPANY AND ALL INTERVENORS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals properly affirm dismissal of the Crow Tribe's complaint when the grounds for that dismissal were fully supported by the record?

2. Is the Ninth Circuit's decision that Congress did not vest the Crow Tribe with a private right of action to enforce Section 2 of the Crow Allotment Act of 1920 consistent with the decisions of this Court?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below were identified at pages ii and iii of the Petition for Writ of Certiorari filed herein.

None of the corporate parties to the proceeding have any parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates that have issued shares of stock to the public that are not named parties herein.

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INTRODUCTION

The Crow Tribe of Indians brought this action against various non-Indian parties who own land within the Crow Indian Reservation, alleging that these landowners had violated Section 2 of the Crow Allotment Act of 1920, 41 Stat. 751 (1920), simply by virtue of the number of acres of land they owned within the Reservation. The nature of the Tribe's complaint was aptly summarized by the district court:

> In a nutshell, the Tribe asserts that § 2 requires this Court to declare void the defendants' title to land in excess of that allowed by § 2, and convey it to the Crow Tribe, a stranger to that title, without consideration for how long the defendants have held title and when and by whom the land was originally conveyed, nor for the improvements thereon (i.e., homes, buildings, fencing, etc.). Moreover, rather than compensating the present title holders, the Tribe, on the basis of its alleged entitlement under § 2, seeks compensation from the defendants as they leave the property they assumed for years they legally owned.

Crow Tribe of Indians v. Campbell Farming Corp., 828 F. Supp. 1468, 1470 (D. Mont. 1992). Pet. App. B, 12.

Both the district court, 828 F. Supp. 1468, and the Ninth Circuit, 31 F.3d 768, held that the Crow Tribe's complaint should be dismissed, with the Ninth Circuit's holding resting on the fact that the Crow Tribe is not an especial beneficiary of Section 2 of the Crow Allotment Act of 1920 and not vested by Congress with any private right of action to enforce Section 2. *Crow Tribe of Indians v. Campbell Farming Corp.*, 31 F.3d 768 (9th Cir. 1994). The Tribe's Petition to this Court first attempts to call into

question the propriety of the Ninth Circuit's review of the private right of action issue, and then attempts to create confusion concerning the correctness of the Ninth Circuit's analysis.

Supreme Court Rule 10.1 counsels that issuance of a writ of certiorari is "not a matter of right, but of judicial discretion." This case presents no reason to exercise that discretion. Section 2 of the 1920 Crow Allotment Act is unique to the Crow Reservation, and thus this case presents no issues of national importance. The reasoning employed by the Ninth Circuit in this case is in harmony, not conflict, with decisions of other courts of appeal. The Ninth Circuit's holding does not conflict with any decision of a state court of last resort. Finally, the Ninth Circuit's holding in no way represents a departure from the acceptable and usual course of judicial proceedings. Quite to the contrary, it is apparent that the record provides ample support for the Ninth Circuit's conclusion that the Crow Tribe has no private right of action to enforce Section 2. The Ninth Circuit's analysis is also consistent with the directives of this Court for determining whether a particular plaintiff is vested with a private right of action under a statute that does not specifically identify the plaintiff as a party intended to enforce the statute. There simply is no reason for this Court to review this case.

STATEMENT OF THE CASE

On March 4, 1991, the Crow Tribe of Indians ("Tribe") commenced this lawsuit against Campbell Farming Corporation, Robert Earl Holding, Sinclair Oil Corporation, d/b/a Sunlight Ranch Company, Sun Valley Company and KMH Ranch Company. The Tribe's complaint alleged that each of these named defendants owns or controls lands located within the Crow Indian Reservation ("Reservation") in excess of the acreages described in Section 2. The Tribe requested that these named defendants be divested of all land owned by them in excess of the acreages described in Section 2. While the

complaint does not identify in whom title to this land should vest, in subsequently filed briefs the Tribe argued that title to the land should vest in the Tribe.[1] The Tribe's complaint also requested that the defendants be enjoined from further violations of Section 2; that the Tribe be awarded damages for the named defendants' use, occupancy and enjoyment of such land; and that the Tribe recover trespass damages and attorney's fees. Fearing that a ruling in favor of the Tribe would put in jeopardy title to most of the land on the Reservation owned by non-Indians, 162 additional farmers and ranchers owning fee land within the Reservation sought and received permission from the district court to intervene as defendants.[2]

The Crow Indian Reservation encompasses approximately 2.3 million acres of land in southeastern Montana. The Reservation evidences a "checkerboard" pattern of land ownership resulting from the allotment of Reservation lands to individual Indians. The allotment of Crow lands was first sanctioned by the Treaty which established the Reservation. Second Treaty of Fort Laramie, Article VI, 15 Stat. 649 (1868). In addition, the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887), authorized the allotment of Reservation lands to individual Crow Indians. On June 4, 1920, Congress enacted the Crow Allotment Act of 1920 to further facilitate allotment of Reservation lands. 41 Stat. 751 (1920).

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1. *See* Crow Tribe's "Memorandum in Opposition to Motions to Dismiss" filed in the district court September 17, 1991, pp. 11, 12; Crow Tribe's "Supplemental Memorandum in Opposition to Motion to Dismiss" filed January 28, 1992 in the district court, pp.. 2, 6; and Brief of Appellant Tribe before the Ninth Circuit, p. 36. Copies of these briefs have been lodged with the Court should any member of the Court wish to review them.

2. The originally-named defendants, together with the 162 additional intervening farmers and ranchers, are collectively referred to herein as "Landowners."

Section 1 of the Crow Allotment Act of 1920 provided that allotments made pursuant to the Act shall "vest title (to the lands allotted) in the allottee." Section 1 further provided that individual allotments were to be evidenced by fee patents to "competent" Indians, and by trust patents conveying full possessory rights in the lands allotted, to minors and "incompetent" Indians. Section 2 of the Act applies only to lands allotted to individual Indians and thereafter transferred to non-Indian ownership.[3] Section 2 commands that the Secretary of the Interior is not to approve any conveyance of land by any Crow Indian to any person, company or corporation who owns at least 640 acres of agricultural land or 1280 acres of grazing land within the Reservation. In addition, Section 2 provides that the Secretary shall not approve the conveyance of land by any Crow Indian to any person, company or corporation that already owns land within the Reservation if, after the conveyance, the acquiring party would own more than 1280 acres of agricultural land or 1920 acres of grazing land. Section 2 further provides that any conveyance by an individual Indian, made directly or indirectly, in violation of the above provisions "shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment."[4]

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3. Section 2 applied to both Indian and non-Indian grantees until 1940 when it was amended to allow individual Indians to acquire lands directly from other Indian owners without conceern for acreage limitations in order to consolidate family holdings. *See* 54 Stat. 252 (1940). This 1940 Amendment does not alter the fact that Section 2 applies only to acquisitions from individual Indians.

4. Contrary to the Tribe's claims, Section 2 does *not* prohibit ownership of land in excess of the quantirties set forth in the statute. Section 2 merely restricts the amount of land which may be purchased directly or indirectly from an Indian. *See Dillon v. Antler Land Company,* 341 F. Supp. 734, 740 (D. Mont. 1972), *aff'd,* 507 F.2d 940 (9th Cir. 1974), *cert. denied,* 421 U.S. 992 (1975).

All of the Landowners filed motions to dismiss the Tribe's complaint, advancing a variety of grounds supporting dismissal, including, *inter alia,* that the complaint failed to state a valid claim for relief and that the Tribe lacked standing to pursue the asserted claims. In addition, Campbell Farming Corporation argued that the Tribe's claims were barred by Montana's statutes of limitation and by laches. Campbell Farming Corporation filed an uncontested affidavit in support of its statute of limitations defense, and this aspect of its motion was thereafter treated as a motion for summary judgment.

Contrary to the Tribe's assertions, the precise issue of whether the Tribe could advance a private right of action under Section 2 of the Crow Allotment Act of 1920 was raised in the first brief filed by the Landowners in the district court, and in every other district court brief and in their answer brief filed in the Ninth Circuit.[5] Lengthy portions of the Landowners and the Tribe's briefs also examined the historical context and legislative history of the 1920 Crow Allotment Act, with special emphasis on the purpose and intended beneficiaries of Section 2.[6]

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5. The issue of whether the Crow Tribe had a private right of action to enforce Section 2 was specifically discussed by the parties in the following briefs at the pages noted. Copies of all these briefs have been lodged with the Court should any member of the Court like to review them: *District Court:* (1) Defendant Landowners' Brief in Support of Motion to Dismiss, filed June 19, 1991 at pages 12-23; (2) Plaintiff Crow Tribe's Memorandum in Opposition to Motion to Dismiss, filed September 17, 199, at pages 58, 62-73; (3) Defendant Landowners' Reply Brief in Support of Motion to Dismiss, filed December 11, 1991, at pages 28-40, 51-57; (4) Crow Tribe's Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss, filed January 28, 1992, at pages 52-53; *Ninth Circuit:* (5) Crow Tribe's Appellate Brief, filed December of 1992, at pages 28-30; (6) Joint Brief of Appellees, filed February 19, 1993, at pages 7-11, 20-22;p (7) Crow Tribe's Reply Brief, filed March of 1993, at pages 5-7, 20-21. There is no need to remand this case for further briefing on this already thoroughly discussed issue.

6. The legislative history of Section 2, the 1920 Crow Allotment Act, and

(Cont'd)

Oral argument was held on these motions to dismiss, and on July 15, 1992, such motions were granted by the district court. *Crow Tribe,* 828 F. Supp. at 1468. Pet. App. B, 11. The district court dismissed the Tribe's complaint after concluding that the Tribe had failed to satisfy any of the Article III constitutional requirements for standing. In addition, the district court determined that Campbell Farming Corporation was entitled to summary judgment on its statute of limitations defense inasmuch as federal law required application of Montana's statute of limitations.

The Tribe appealed this decision to the Ninth Circuit. There, the Landowners again advanced the argument that the Tribe was not an especial beneficiary of Section 2, and thus without any implied private right of action to advance their claims. The Tribe responded to this argument in its reply brief. The legislative history and underlying purpose of Section 2 was again discussed in great detail in all the briefs filed with the Ninth Circuit. *See supra,* notes 5 and 6. At oral argument before the Court of Appeals there was also discussion concerning the Tribe's role under Section 2, and the Tribe's inability to pursue any action under this provision of the Crow Allotment Act.[7]

(Cont'd)
the 1887 General Allotment Act were discussed by the parties in the following briefs at the pages noted. Again, copies of these pleadings have been lodged with the Court for its reference. *District Court:* (1) Defendant's Brief in Support of Motion to Dismiss, at pages 5, 20-22; (2) Tribe's Memorandum in Opposition to Motion to Dismiss, at pages 1-4, 23-47; (3) Defendants' Reply Brief in Support of Motion to Dismiss, at pages 30-39; (4) Tribe's Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss, at pages 10-16; *Ninth Circuit:* (5) Tribe's Appellate Brief, at pages 8-22; (6) Joint Brief of Appellees, at pages 4-13; and (7) Crow Tribe's Reply Brief, at pages 13-19. Nothing would be gained by remanding this case for additional briefing on this issue.

7. See Transcript of January 5, 1994 oral argument at pages 6, 7, 8, 9, 18, 20 and 25. A copy of this transcript has also been lodged with the Court should any member of the Court wish to review it.

On July 20, 1994, the Ninth Circuit Court of Appeals, in a unanimous decision authored by Judge William C. Canby, Jr., held that the Tribe has no private right of action to enforce Section 2. In reaching this conclusion, the Ninth Circuit determined both that the Tribe was *not* an especial beneficiary of Section 2, and that the legislative history of the Crow Allotment Act evidenced no congressional intent to vest the Tribe with any private right of action to enforce the provisions of Section 2.[8] The Ninth Circuit affirmed the district court's dismissal of the Tribe's complaint, and subsequently denied the Tribe's petition for rehearing with no judge dissenting.[9]

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8. The Ninth Circuit reviewed this issue in accordance with the four part test delineated in *Cort v. Ash*, 422 U.S. 66, 78 (1975). *See Crow Tribe*, 31 F.3d at 769. These factors are: (1) Does the plaintiff belong to the class for whose especial benefit the statute was passed?; (2) Does the legislative history disclose any intent to create or deny the right?; (3) Is the plaintiff's enforcement of the statute consistent with the statute's purpose?; (4) Is the cause of action one traditionally relegated to state law?

9. This Court has appropriately held that an appellee may defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the lower courts. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 (1979); *Granfinanciera v. Nordberg*, 492 U.S. 33, 38 (1989). In addition to the defenses of lack of standing and lack of a private right of action, the Landowners also asserted that the Tribe failed to join indispensable parties, the Tribe is not the real party in interest, and that Section 2 is unconstitutionally vague as to what activity it proscribes. Finally, Campbell Farming Corporation also demonstrated that the Tribe's claims were barred by Montana's five year statute of limitations. Each of these arguments is supported by the record and would justify affirmance of the District Court and a denial of the Tribe's petition.

REASONS FOR DENYING THE WRIT

I.

THE RECORD FULLY SUPPORTS THE NINTH CIRCUIT'S DISMISSAL.

It is a fundamental and well settled rule that a reviewing court may affirm a lower court's decision on any grounds supported by the record, including grounds different from those relied upon by the lower court. *See e.g., Helvering v. Gowran,* 302 U.S. 238, 245 (1937); *Jaffke v. Dunham,* 352 U.S. 280, 281 (1957); *United States v. Washington,* 969 F.2d 752, 755 (9th Cir. 1992), *cert. denied,* __ U.S. __, 113 S. Ct. 1945, 123 L. Ed. 2d 651 (1993). The Tribe articulates its acceptance of this rule, as it must, but then asserts that the private right of action issue was "unilaterally" reached by the Ninth Circuit without providing the Tribe a "full, fair and meaningful opportunity to be heard." (Pet. 9, 10). In addition to the extensive discussion of the private right of action issue, the standing argument was thoroughly reviewed by all parties. As noted by the Ninth Circuit, the issues of standing and private right of action are similar in that both are primarily concerned with the identity of the party bring the suit. *Crow Tribe,* 31 F.3d at 769. (Pet. App. A, 3); *see also, National Railroad Passenger Corporation v. National Association of Railroad Passengers,* 414 U.S. 453, 455, 456 (1974). The Tribe's characterization of both the Ninth Circuit's review of this issue and the Tribe's opportunity throughout this litigation to present arguments thereon is simply inaccurate and nothing more than an attempt to evoke sympathy where none is warranted.

As notes 5 and 6 indicate, both the Landowners and the Tribe devoted significant portions of their briefs to the specific issue of whether the Tribe could properly assert a private right of action

under Section 2 of the Crow Allotment Act of 1920.[10] The Landowners, at both the district court and the Ninth Circuit, extensively argued that the Tribe could assert no claims based on Section 2, since that section comprised part of an allotment act and was in no way intended to especially benefit the Tribe. In support of this argument, the Landowners quoted to both courts the following portion of this Court's decision in *Montana v. United States,* 450 U.S. 544 (1981), which considered the Crow Allotment Act of 1920:

> The policy of the [allotment] Acts was the eventual assimilation of the Indian population and the "gradual extinction of Indian reservations and Indian titles." The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that this allotment policy was designed to eventually eliminate tribal relations. And throughout the congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian

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10. As further evidence that the private right of action issue was well developed on the record, Landowners direct this Court's attention to Note 18 of the district court decision, *see Crow Tribe*, 828 F. Supp. at 1475, Pet,. App. B., 26:

> Although the Tribe may vigorously protest, prior to the Indian Reorganization Act, Congress did not conclusively express an interest in preserving tribal sovereignty. The legislative background indicates that § 2 was never intended as a cause of action after fee patented land was properly sold the first time. I therefore expect defendants are correct in asserting that the Tribe has no cause of action under § 2. I expect defendants would prevail on their motion to dismiss for failure to state a claim for the same reason. It is simply unnecessary, however, to address those issues in detail since the two threshold issues dealt with in this Memorandum are dispositive.

> population was to be accomplished, in part, by the dissolution of tribal relations.
>
> * * *
>
> There is simply no suggestion in this legislative history that Congress intended that the non-Indians who would settle upon alienated lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

(Citations omitted). *Id.* at 559, n. 9. *See also, Duro v. Reina,* 495 U.S. 676, 691 (1990); *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 650 n. 1 (1976).

Against this historic backdrop, the Landowners developed the legislative history behind Section 2. This legislative history shows that Congress did not intend to especially benefit the Tribe or to vest the Tribe with any rights to bring an action to enforce Section 2. *See, e.g.,* Comments of Senator Walsh, S. REP. No. 219, 66 Cong. 1st Sess. (Sept. 23, 1919) (quoted in Joint Brief of the Appellees before the Ninth Circuit, pp. 8, 9); Comments of Representative Riddick, 59 CONG. REC. 5999 (April 22, 1920) (quoted in Joint Brief of the Appellees before the Ninth Circuit, p. 9).

In addition to this discussion, the Landowners specifically cited *Cort v. Ash*, 422 U.S. 66 (1975), and relied upon its four part test to further establish that the Tribe has no private right of action to enforce Section 2. The Tribe also cited repeatedly to *Cort* in arguing that the Tribe did possess a right of action under Section 2. The Tribe was given a full, fair and meaningful opportunity to present arguments on this issue, and the basis of the Ninth Circuit's decision is fully supported by the record.

II.

THE NINTH CIRCUIT HAD TO ADDRESS WHETHER THE CROW TRIBE POSSESSED A PRIVATE RIGHT OF ACTION UNDER SECTION 2.

The Tribe disputes the propriety of the Ninth Circuit's inquiry into whether the Tribe possessed a private right of action under Section 2. However, before a court can consider the merits of a particular plaintiff's complaint, or the propriety of the relief requested, it must be established that the plaintiff is entitled to invoke the judicial process. *Linda R. S. v. Richard D.*, 410 U.S. 614, 616 (1973).

In considering the Tribe's ability to advance the claims asserted in its complaint, it is critical to note that at no relevant time did the Tribe possess any legal entitlement or propriety interest in any of the lands subject to Section 2. Authority from this and other courts confirms that third party strangers to title cannot present a valid cause of action questioning land titles in which they have no interest. *See Fisher v. Rule*, 248 U.S. 314 (1919); *Northern Plains Resource Council v. Lujan;* 874 F.2d 661 (9th Cir. 1989). As the Ninth Circuit noted in *Raypath Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1976).

> [T]he validity of a deed or patent from the

> federal government may not be questioned in a suit brought by a third party against the grantee or patentee, e.g. *St. Louis Smelting and Refining Co. v. Kemp*, 104 U.S. 636, 647, 26 L. Ed. 875 (1882); *VanWyk v. Knevals*, 106 U.S. 360, 369, 1 S. Ct. 336, 27 L. Ed. 201 (1882). Simply stated, a plaintiff in such a case has no cause of action.

Here, too, the Tribe, as a third party stranger to title, cannot bring its claims before the courts because it has no legal property interest in the lands subject to Section 2. Recognizing that the Tribe lacked any interest in the lands involved in their complaint, the Ninth Circuit was required to consider whether Section 2 of the Crow Allotment Act of 1920 provided a separate and independent statutory basis for a private right of action in the Tribe. The Ninth Circuit appropriately conducted that inquiry and appropriately determined that the Tribe had no such basis for bringing its claims.

III.

IN ITS ANALYSIS OF SECTION 2, THE NINTH CIRCUIT CORRECTLY DIFFERENTIATED BETWEEN THE TRIBE AND INDIVIDUAL INDIANS.

A. The Tribe Is Not Mentioned In Section 2.

The Ninth Circuit, in considering whether the Tribe possessed a valid private cause of action under Section 2, began its analysis by carefully reviewing the specific language of the statute to determine if the Tribe was included within the class intended to be especially benefited by the law. *Crow Tribe*, 31 F.3d at 770. (Pet. App. A, 5, 6). In so doing, the Ninth Circuit correctly observed that there is no reference whatsoever to the

"Tribe" within the whole of Section 2. Rather, the Court observed, Section 2 refers to individual Indians in their "individual capacities", to the Secretary of the Interior, and to purchasers of land. As Judge Canby's opinion states, "Conspicuously absent is any reference to the Tribe or even a vague reference to Indians that might create room for argument." *Id.* (Pet. App. A, 6).

B. The Remedy Provisions Exclude The Tribe.

In addition to carefully considering the specific language employed by Congress in Section 2, the Ninth Circuit also looked at the statutory remedies contemplated by the statute to determine whether those remedies disclose that the Tribe, while not mentioned in the statute, was nevertheless intended to possess some private right to enforce Section 2. Again, the Ninth Circuit's review evidenced that the three remedy provisions contained within Section 2 were directed toward individual Indians and the United States, but not the Tribe. *Id.* (Pet. App. A, 7).

At pages 15-17 of its Petition, the Tribe asserts that because the statutory remedy for Section 2 violations might be interpreted to make violative conveyances merely "voidable" and not necessarily "void", the Tribe should be given an opportunity to advance an "equitable" remedy which might bring the Tribe within the scope of those parties covered by the statute. The Tribe's argument appears to be that if void *could* mean voidable, and if the Tribe *could* convince a court that it ought to receive the alleged excess lands, then the Tribe *should* have the right to pursue its own action. Surely, Congress did not envision that such a bootstrapping approach could establish a private right of action. By hypothetically fitting oneself within the ambit of some self-created equitable remedy, one does not become an especial beneficiary of a statute. Further, it is clear that the Tribe's argument in this regard is contrary to settled law that provides

that when a statute sets forth a specific remedy, courts must be especially reluctant to provide other remedies in "the absence of strong indicia of contrary Congressional intent." *Middlesex County Sewerage Authority v. Sea Clammers,* 453 U.S. 1, 15 (1981); *Karahalios v. National Federation of Federal Employees,* 489 U.S. 527, 533 (1989).

The authorities cited by the Tribe for the notion that "void" may mean "voidable" add nothing to the Tribes's position. In *Ewell v. Daggs,* 108 U. S. 143 (1883) this Court held that a contract could be voided by a party to the contract under a Texas usury statute. In *Atlantic Coast Line R. Co. v. State of Florida,* 295 U.S. 301 (1935), the Court noted that charges levied under a void or voidable order of the Interstate Commerce Commission could be claimed as an equitable remedy by those who had paid the charges. Finally, in *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the Court concluded that an innocent party to an improper merger could elect to set aside the merger. Significantly, in each of these cases, the party empowered to void an agreement, challenge a rate, or defeat a merger was directly involved in the underlying transaction, and thus possessed their own right of action. The Tribe's analysis of "void" or "voidable", at the remedy stage, begs the question of whether the Tribe has the necessary right of action to *commence* the suit. The fact that an individual Indian grantor may have the election of treating a conveyance completed in violation of Section 2 as void or voidable does not give rise to a private right of action in the Tribe.

C. The Ninth Circuit's Consideration of Legislative History Was No Detour.

In addition to reviewing the statutory language and remedy aspects of Section 2, the Ninth Circuit also specifically considered the legislative history of Section 2 in concluding that Congress intended "only individual Indians to have a right of

action." *Crow Tribe*, 31 F.3d at 771, Pet. App. A, 7. In reaching this inescapable conclusion, the Ninth Circuit noted the Congressional policies in place at the time the Crow Allotment Act was passed and that the Act was intended to further the policy of assimilation by making "individual Indians more independent." As such, the Ninth Circuit correctly concluded that the policy considerations behind allotment would be wholly inconsistent with the notion that Congress intended to provide the Tribe with a private right of action to enforce Section 2. *Id.* Pet. App. A, 9.

The Tribe also asserts that the Ninth Circuit erred and "took a detour" in looking for evidence of Congressional intent to vest the Tribe with a private right of action. This inquiry by the Ninth Circuit involved neither a "detour" nor any error in legal analysis, but rather was in complete accord with the holdings of this Court relative to determining whether a particular plaintiff possesses an implied right of action. In fact, it is now clear that in "determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute." *Thompson v. Thompson,* 484 U.S. 174, 179 (1988). This intent on the part of Congress is the "essential predicate for implication of a private remedy." *Id.*

The Tribe's rationale for objecting to any inquiry into legislative intent is certainly understandable since that inquiry leaves no doubt but that Congress did not intend to place the enforcement of Section 2 in the hands of the Tribe. The Tribe has never, in the district court, circuit court, or this Court, pointed to a single bit of legislative history that would indicate that Section 2 was enacted for the especial benefit of the Tribe, much less that Congress intended to provide the Tribe with an implied private right of action to enforce this section. *See Touche Ross & Co. v. Redington,* 442 U.S. 560, 571 (1979). It is the Tribe's burden to provide this evidence, and the Tribe has consistently failed to

carry that burden. *See Suter v. Artist M,* 503 U.S. 347, 118 L. Ed. 2d 1, 16 (1992).

This Court has instructed that legislative intent may be inferred from the language and context of the statute, as well as from its legislative history. *See Thompson v. Thompson,* 484 U.S. at 180. It was, in fact, these very things that the Ninth Circuit considered in its review of the Tribe's attempt to assert a private right of action in this case. In addition this Court has instructed that the intent to supply a private right of action is to be determined at the time of Congressional passage of the Act under review, and not at some later date, *Id.* Here, all of the indicia of legislative intent in existence at the time of passage of the Crow Allotment Act of 1920 reinforces the Ninth Circuit's determination that the Tribe has no implied right of action to enforce Section 2.

In the face of the Ninth Circuit's thoughtful analysis and compelling reasoning, the Tribe nevertheless asserts that the court committed error, and that the court should have treated the Tribe and individual Indians as one for purposes of the Tribe's complaint. The Tribe conveniently ignores, in advancing this argument, that Section 2 is found within the Crow Allotment Act of 1920. As noted, the 1920 Act was passed to implement the policies behind the General Allotment Act, — the termination of Tribes, the ending of tribal relations and the assimilation of individual Indians into modern society. *Duro v. Reina,* 495 U.S. 676, 691 (1990); ("The 60 years preceding the [Indian Reorganization] Act had witnessed a calculated policy favoring elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant culture."); *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 650 n.1 (1976). These policies are wholly inconsistent with any intent to provide the Tribe with a private right of action. As the Ninth Circuit noted, the language and historical context of

Section 2 leave no doubt but that Section 2 was intended to benefit individual Indians and not the Tribe. Quite simply, the Crow Allotment Act of 1920 was passed with the ultimate expectation by Congress that the Tribe would eventually disappear, not with an expectation or intention that the Tribe should be vested with special rights flowing from the Act. The rights conferred on individual Indians through the allotment process were intended to further the termination of tribal relations and to place individual Indians in an independent status free of tribal influence. The complained of distinction between the Tribe and individual members was, therefore, a distinction made by Congress nearly 75 years ago, and not one created by the Ninth Circuit.

D. The Ninth Circuit's Distinction Between The Tribe And Individual Indians Is Consistent With Applicable Law.

The Tribe asserts that it would defy "common sense" to conclude that a statute giving a private right of action to an individual Indian would not also confer a similar right in the Tribe. Yet, such distinctions between Tribes and individual Indians are regularly and properly reached by the courts and Congress. *See, e.g., Apodaca v. Silvas,* 19 F.3d 1015, 1017 (5th Cir. 1994) (finding individual Indian lacked private right of action to sue under a provision of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act of 1987 — because the Act was intended to benefit the Tribe); *Citizens Band of Potawatomi Indian Tribe of Oklahoma v. Collier,* 17 F.3d 1292 (10th Cir. 1994) (finding Indian tribe had no interest in lands located on another reservation which might be allotted to members of plaintiff tribe); 25 U.S.C. § 357 (authorizing the condemnation of allotted lands only). It is also well established that individual Indians have no private right of action to enforce the Indian Non-Intercourse Act, 25 U.S.C. § 177, since that Act was designed only to protect tribal land

rights.[11] *James v. Watt,* 716 F.2d 71, 72 (1st Cir. 1983), *cert. denied,* 467 U.S. 1209 (1984); *United States v. Dann,* 873 F.2d 1189, 1195 (9th Cir. 1989), *cert. denied, Dann v. United States,* 493 U.S. 890 (1989); *Golden Hill Paugussett Tribe of Indians v. Weicker,* 39 F.3d 51, 56 (2nd Cir. 1994). Just as courts have properly distinguished between a tribe and an individual Indian in concluding that only tribes possess a private cause of action to enforce the Indian Non-Intercourse Act, so, too, did the Ninth Circuit properly differentiate between individual Indians and the Crow Tribe in concluding that only individual Indians possess a private right of action to enforce Section 2.

Contrary to the Tribe's inference, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), Pet. 13, is applicable here and provides a vivid illustration of how the inherent tension between a tribe and its members can impact and limit their respective rights under a statute. In *Santa Clara,* this Court observed that the Indian Civil Rights Act expanded the rights of individual Indians at the expense of certain tribal powers. Similarly, allotments pursuant to the Crow Allotment Act of 1920 depleted the land base of the Tribe. The recognized purpose of allotment acts was to disempower tribes while empowering individual Indians "to take their place as independent, qualified members of the modern body politic." *Poafpybitty v. Skelly Oil Company,* 390 U.S. 365, 369 (1968), quoting *Board of County Commissioners v. Seber,* 318 U.S. 705, 715 (1943). The tension between the interests of the Tribe and individual Indians stemming from the Crow Allotment Act of 1920 further explains why individual Indians may possess a private right of action under Section 2 while the Tribe does not.

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11. The Indian Non-Intercourse Act cannot be looked to by the Tribe since the only lands subject to Section 2 are lands allotted to individual Indians pursuant to the 1920 Crow Allotment Act.

E. The *Puyallup* Decision Does Not Support The Tribe's Argument.

Finally, *Puyallup Tribe v. Washington Game Department,* 433 U.S. 165 (1977), is inapposite to the Tribe's position. In *Puyallup,* the State of Washington, as plaintiff, sought to require members of the Puyallup Tribe to obey state laws controlling fishing for steelhead trout. The State's complaint, which placed in issue the treaty fishing rights of the Puyallup Tribe and its members, did not name the Tribe as a defendant (presumably because of the Tribe's immunity from suit), and instead named a number of individual Indian defendants, including three tribal officials, as well as unidentified tribal members John Doe and Jane Doe. In response to the State's lawsuit, the Puyallup Tribe did appear, both on behalf of its members and in its capacity as a sovereign. The situation presented in *Puyallup* is hardly akin to the instant action.

Here, the Tribe *commenced* this action as the *sole* party plaintiff. In addition, the Crow Tribe looks to an allotment act to support its claims, rather than asserting treaty based defenses. Further, the right of the Crow Tribe to independently pursue its claims has been disputed by the Landowners from the very outset of this case, while in *Puyallup* the Court noted that the record showed no objection to the "Tribe's representation of the individual defendants." 433 U.S. at 170, n. 8.

Another extremely significant difference involves the end result sought to be achieved and the interests sought to be protected in each case. In *Puyallup,* the Puyallup Tribe asserted *its* treaty rights for fishing, rights that were utilized by or which presumably inured to the benefit of all tribal members. Further, the defenses advanced in *Puyallup* directly related to the sovereign rights and powers of the Puyallup Tribe. Here, the Crow Tribe has admitted that Section 2 "does not directly

implicate the Tribe's governmental interests." Pet. 13.[12] Additionally, the relief sought by the Crow Tribe is personal to the Tribe, in the form of monetary damages and title to land. Moreover, the Tribe's admission that some individual tribal members will likely be directly harmed should the Tribe be permitted to pursue its claims clearly distinguishes this case from *Puyallup*. Pet 18, n. 12.[13]

In addition to these obvious and dramatic distinctions, this Court's analysis of the Puyallup Tribe's sovereign immunity defense provides yet another example of the differing treatment accorded tribes and individual Indians. In *Puyallup*, this Court noted that the Tribe was immune from suit, but that individual members of the Puyallup Tribe were not.

> [W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violation of state law by individual tribal members is permissible. The doctrine of sovereign immunity which was applied in *United States*

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12. The Tribe also cites to *Moe v. Confederated Salish & Koorenai Tribes*, 425 U.S. 463 (1976). Again, *Moe* involved issues of tribal sovereignty (Freedom from state taxation) and the effort by a tribe to protect the interests of *all* tribal members (to be free from additional taxes). *See New York Tax Dept. v. Milhelm Attea & Bros. Inc.*, 512 U.S. __, 129 L. Ed. 2d 52, 64 (1994).

13. Even if one accepted the Tribe's faulty premise that because Section 2 benefits individual Indians, the Tribe might also have a private right of action under Section 2, the noted admission of antagonistic interests between the Tribe and individual Indians would be fatal to the Tribe's claims, based on the Tribe's own statement that "in the absence of any indication of an adversity of interest between ... a tribe and its members, one would naturally and ordinarily believe that a law enacted to benefit one also would be intended to benefit the other." Pet. 13.

> *v. United Fidelity and Guaranty Co.*, 309 U.S. 506, 84 L. Ed. 894, 60 S. Ct. 653, does not immunize the individual members of the Tribe.

Puyallup Tribe, 433 U.S. at 171-172. *See also, United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).

It is clear that the Ninth Circuit correctly concluded that the Crow Tribe cannot pursue its own action to enforce Section 2 simply because that Section benefits individual Indians who are also members of the Tribe. To have concluded otherwise would defy common sense, and would have required the Ninth Circuit to ignore the intent of Congress expressed in the Crow Allotment Act of 1920.

IV.

28 U.S.C. § 1362 IS A JURISDICTIONAL STATUTE ONLY.

In its Petition (p. 19, 20), the Tribe argues that the Ninth Circuit erred in not considering the "potentially dispositive" impact of 28 U.S.C. § 1362. The Tribe asserts that this statute supplies the Tribe with its missing private right of action by permitting the Tribe to stand in the shoes of the United States and enforce Section 2. The Tribe's argument misapplies this jurisdictional statute and improperly attempts to expand its scope. Section 1362 provides:

> The district court shall have original jurisdiction of all civil actions, brought by any Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy

arises under the Constitution, laws, or treaties of the United States.

Section 1362 was enacted in 1966 for the *sole* purpose of allowing Indian tribes to bring actions in federal court without first satisfying the amount in controversy requirement then existing under the federal question statute. *See* H.J.R. REP. NO. 2040 (Sept. 12, 1966), at 3146; WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE,* § 3579 (1973). Section 1362 provides federal courts with *jurisdiction* over certain federal Indian claims, but that is all it accomplishes. *United States v. Nordic Village, Inc.,* 503 U.S. 30, 112 S. Ct. 1011, 1017, 117 L. Ed. 2d 181, 190 (1992); *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 689 (1991). As this Court has noted, "The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." (emphasis supplied by Court), *Nordic Village Inc.,* 503 U.S. at __, 117 L. Ed. 2d at 190, quoting from *Blatchford,* 501 U.S. at __, 115 L. Ed. 2d at 699.

Congress, in authorizing federal court jurisdiction over tribal claims, did not, and indeed could not, waive the Constitutional requirements which require that every plaintiff validly possess its own cause of action. Thus, while Section 1362 would provide the Tribe access to federal court *if* the Tribe could establish its own private right of action, Section 1362 is of no assistance to the Tribe in this case.

V.

THE NINTH CIRCUIT APPLIED WELL ESTABLISHED LAW IN DETERMINING THAT THE TRIBE HAS NO IMPLIED PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 2.

In attempting to persuade this Court that review of the Ninth Circuit's opinion is appropriate, the Tribe asserts that the Ninth Circuit's analysis of the *Cort v. Ash* standards for a private right of action is in conflict with the decisions of other circuits, and that the conclusions reached by the Ninth Circuit herein are incorrect. The Tribe is wrong on both points.

Initially, it must be noted that the Tribe fails to cite to a single case which supports its assertion that the inquiry undertaken by the Ninth Circuit was legally incorrect or in any way at odds with established case law. The Tribe's citations to *Sterling Suffolk Racecourse Ltd. Partnership v. Barrellville Racing Ass'n Inc.*, 989 F.2d 1266 (1st Cir. 1993) and *American Telephone & Telegraph Co. v. M/V Cape Fear*, 967 F.2d 864 (3rd Cir. 1992) provide no support for the Tribe's attack on the Ninth Circuit's reasoning nor do those cases evidence any conflict between the circuits, since both employed the same analytical reasoning employed herein by the Ninth Circuit. Both cases cited by the Tribe required that there first be a determination of whether the party advancing a particular claim is an "especial beneficiary" of the relevant statute, with the inquiry then proceeding to a determination of whether Congress intended to vest that plaintiff with an implied right of action to enforce such statute. *See American Telephone & Telegraph Co.*, 967 F.2d at 866, 867; *Sterling Suffolk*, 989 F.2d at 1268-1271. These cases describe precisely the type of inquiry undertaken by the Ninth Circuit, and that inquiry is fully consistent with the holdings of this Court. *See, e.g., California v. Sierra Club*, 451 U.S. 287 (1981);

Thompson v. Thompson, 484 U.S. 174 (1988); and *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527 (1989).

Much of the Tribe's argument concerning the Ninth Circuit's "especial beneficiary" analysis is built upon the Tribe's faulty premise that the Tribe and individual members must be viewed as one for purposes of Section 2. As discussed at pages 12 through 21, this argument ignores the specific language employed in Section 2, which carefully omits any reference to the Tribe, the remedy provisions of the statute, and the fact that Section 2 was part of an act that was intended to benefit individual Indians at the expense of the Tribe. These factors alone establish that the Tribe is not an especial beneficiary of Section 2, and thus without any private right of action to enforce that section.

Additionally, a review of the Tribe's Petition evidences a continuing misunderstanding of the especial beneficiary requirement. Throughout its Petition, the Tribe argues that it would be "benefited" by enforcement of Section 2 (*see, e.g.*, Pet. 13, 17), and that it has an interest in protecting tribal members and the overall character of the Reservation (Pet. 16). Even if the Tribe's assertions were accepted as true, courts are not free to "engraft a remedy on a statute . . . that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981). Furthermore, the possibility that the Tribe might derive some indirect or ancillary benefit from enforcement of Section 2 does not make the Tribe the *especial* beneficiary of this law. Moreover, any incidental benefit which might arguably be derived from enforcement of this law does not rise to the level that would equate with a finding of obvious Congressional intent to vest the Tribe with a private right of action to enforce Section 2. "The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra club*, 451 U.S. 287, 294 (1981).

Section 2 was, as noted by the Ninth Circuit, aimed at individual Indians, the allotment process, and the federal government's oversight responsibilities relating thereto. The Act provides specific directives to the Secretary of the Interior when considering whether to approve a conveyance of land held in trust for individual Indians. The fact that this statute is framed as a directive to the Secretary of the Interior further supports the conclusion that Congress did not intend this Section to create any right of action in the Tribe. *See Universities Research Association v. Coutu*, 450 U.S. 754, 772 (1981).

Furthermore, Section 2 provides specific punitive penalties, including criminal penalties, for violations of Section 2. The existence of criminal penalties as an integral part of the enforcement mechanism is extremely instructive that Congress did not intend for tribal enforcement, since Congress has never viewed tribes to have any punitive powers over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Thus, the entire structure, language, context and history surrounding Section 2 demonstrated that Congress intended no one other than the individual Indian owners and the United States to have any special rights to enforce Section 2. *See Dillon v. Antler Land Company*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975); *see also, Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). Additionally, inasmuch as Congress has supplied within the statute "elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies. . . ." *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14 (1981).

Finally, the Tribe asserts that the Ninth Circuit was required to consider the third and forth *Cort* criteria before deciding whether the Tribe was vested with a private right of action. It is

clear, however, that if the first two criteria set forth in *Cort* are not satisfied, courts need not consider the remaining factors, because the third and fourth factors are only relevant "if the first two factors give indication of Congressional intent to create the remedy." *California v. Sierra Club*, 451 U.S. 287, 298 (1981). Put another way, because the first two factors of *Cort* do not evidence any Congressional intent to vest the Tribe with a private right of action, the "essential predicate for implication of a private remedy plainly does not exist." *Thompson v. Thompson*, 484 U.S. at 179.

CONCLUSION

For all the reasons stated above, the Crow Tribe's petition for a writ of certiorari should be denied.

Respectfully submitted,

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